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of that day would probably have said that the common law and civil liberty were virtually indistinguishable.

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n26. Civil Rights Act of 1866, ch. 31, 1, 14 Stat. 27 (1866).

n27. Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866).

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The bill was passed pursuant to Congress's authority to enforce the provisions of the Thirteenth Amendment, and was designed to counter the so-called "Black Codes" passed by the Southern states, denying fundamental civil rights to the freedmen. From its inception, however, the 1866 Act was plagued with doubts as to its constitutionality. President Andrew Johnson vetoed the Act for that reason, and although his veto was overridden, constitutional concerns were sufficiently serious that supporters of the Act set to work on a constitutional amendment to cure them. These concerns were not confined to members of the political opposition. The principal draftsman of the Fourteenth Amendment, Representative John A. Bingham of Ohio, was among those who believed the principles of the 1866 Act to be desirable, but Congress's power to be lacking. n28 The principal purpose of Section 1 of the Fourteenth Amendment, as virtually all students of the subject agree, was to provide a firm constitutional basis for the 1866 Act and to ensure that future Congresses would not be able to repeal it. n29

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n28. See Nelson, supra note 9, at 48.

n29. See, e.g., Berger, supra note 13, at 22-23; Nelson, supra note 9, at 48; Bickel, supra note 6, at 58; Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863, 910-11 (1986).

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The Civil Rights Act of 1866 was evidently never intended by its sponsors to speak to the issue of school segregation, but the debate [*959] over its phrasing has considerable bearing. As originally introduced by Senator Trumbull, the bill, as amended, began with a statement of general principle: "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery." n30 It then enumerated a list of specific rights that would be guaranteed to persons of "every race and color." n31

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n30. Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866).

n31. Id.

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Controversy revolved around the opening statement forbidding "discrimination in civil rights or immunities." Trumbull equated this phrase with the privileges and immunities protected under Article IV, as interpreted in the famous case of Corfield v. Coryell. n32 This broad interpretation inspired opponents of the bill to stress its radical implications, and to claim that it exceeded Congress's authority under Section 2 of the Thirteenth Amendment. Senator Edgar Cowan, a conservative Republican from Pennsylvania, expressly charged that the bill would outlaw segregated schools in his state, a result he professed to find "monstrous." n33 Representatives Michael Kerr of Indiana and Andrew Rogers of New Jersey made similarly dire references to school segregation in the lower chamber. n34 The mere fact that opponents of the bill would leap to the conclusion that segregated schools are a violation of "civil rights or immunities" suggests that the institution of segregation was understood to be problematic. Other speakers warned of different perils, a favorite being that the bill would forbid anti-miscegenation statutes. n35 Some said it might include political rights. n36 The basic theme was that the terms of the bill were so broad that they would swallow up the powers of the states. "What [*960] broader words than privileges and immunities are to be found in the dictionary?" Rogers asked. n37

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n32. 6 F. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823) (No. 3230); see Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866).

n33. Cong. Globe, 39th Cong., 1st Sess. 500 (Jan. 30, 1866).

n34. Id. at 1268 (Mar. 8, 1866) (statement of Rep. Kerr); id. at 1121 (March 1, 1866) (statement of Rep. Rogers); see also id. at app. 183 (Apr. 6, 1866) (statement of Sen. Davis) (asserting that the bill would make any enforcement of racial distinctions criminal).

n35. See, e.g., id. at 1122 (Mar. 1, 1866) (statement of Rep. Rogers); id. at 505-06 (Jan. 30, 1866) (statement of Sen. Johnson). President Johnson reiterated this charge in his veto message. Id. at 679-80 (Mar. 27, 1866).

n36. E.g., id. at 1157 (Mar. 2, 1866) (statement of Rep. Thornton); accord id. at 1291 (Mar. 9, 1866) (statement of Rep. Bingham); id. at 476 (Jan. 29, 1866) (colloquy between Sen. Trumbull and Sen. McDougall); id. at 477 (statement of Sen. W. Saulsbury).

n37. Id. at 1122 (Mar. 1, 1866).

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James Wilson, Chairman of the House Judiciary Committee and leading supporter of the bill, attempted to quiet these fears with a narrow construction of the term "civil rights or immunities." He expressly denied that the term would encompass the right to sit on juries or to attend the same schools. n38 This was the only statement by a proponent of the bill during the debates specifically denying its applicability to school desegregation. It is the most direct piece of evidence invoked by Alexander Bickel; n39 Raoul Berger calls it "proof positive that segregation was excluded from the scope of the bill." n40

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n38. Id. at 1117.

n39. Bickel, supra note 6, at 56.

n40. Berger, supra note 13, at 119.

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Wilson's assurances did not satisfy the opposition, however, and Bingham himself eventually moved to strike out the "no discrimination" clause. n41 Wilson supported this change on the ground that the original language "might give warrant for a latitudinarian construction not intended." n42 The motion carried unanimously, and without further delay the bill passed by an overwhelming margin. n43

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n41. Cong. Globe, 39th Cong., 1st Sess. 1291 (Mar. 9, 1866). Bingham's principal concern in making the amendment was to ensure that the bill was not interpreted to include "political rights," the rights to vote and hold office. Id.

n42. Cong. Globe, 39th Cong., 1st Sess. 1366 (Mar. 13, 1866).

n43. Id. at 1366-67.

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This course of events strongly suggests that the Civil Rights Act of 1866 was not understood to forbid school segregation, n44 but it does not necessarily mean the same for the Fourteenth Amendment. To be sure, the principal purpose of the Fourteenth Amendment was to constitutionalize the 1866 Act, and speakers on both sides often spoke as if the substance of the two measures were identical. n45 If we were to interpret the Amendment as meaning no more than the 1866 Act, we would have to conclude that the [*961] Amendment did not forbid school segregation. n46 But the Fourteenth Amendment did not enumerate a list of protected rights, as did the 1866 Act. Rather, it provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." n47 If we accept Trumbull's equation of "civil rights or immunities" to the phrase "privileges and immunities," n48 the Amendment contains a provision identical to the clause of the 1866 bill that was dropped on account of being too broad. A fair inference is that the Amendment was understood to encompass the broad range of "civil rights and immunities" that were entailed by the original draft of the 1866 Act.

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n44. Some Northern Republican newspapers nonetheless reported that the Act would require admission of blacks to schools on the same terms and conditions as whites, and after passage of the Act there was a flurry of litigation based on that reading. See Lofgren, supra note 9, at 65; Kelly, supra note 14, at 1070.

n45. See Bickel, supra note 6, at 47; Kaczorowski, supra note 29, at 911.

n46. This, in a nutshell, is Berger's argument. Berger, supra note 13, at 22-23.

n47. U.S. Const. amend. XIV, 1.

n48. This congruence is probable but not certain. Some moderate Republicans understood the term "privileges and immunities" as narrower than the term "civil rights," the latter possibly encompassing "every right that pertains to the citizen under the Constitution, laws, and Government of this country," including political rights. Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham); see Maltz, supra note 13, at 101. If so, the understanding was short-lived, for the term "civil rights" was frequently used in debates in the 1870s as a shorthand description for the set of protected rights, excluding both "political rights" and "social rights." For a particularly clear example, see Trumbull's speech of February 8, 1872, in which he stated that the Civil Rights Act of 1866 "was based upon this principle - confined exclusively to civil rights and nothing else, no political and no social rights." Cong. Globe, 42d Cong., 2d Sess. 901 (Feb. 8, 1872).

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The linchpin of Alexander Bickel's argument is that the Joint Committee's decision not to include the language "civil rights and immunities" (using the phrase "privileges or immunities" instead) was a "deliberate choice" that constituted a "rejection of what were deemed [the] wider implications" of the original draft of the 1866 Act. n49 But this interpretation is implausible in the context of the debate. Not only did Lyman Trumbull specifically equate the terms, but supporters linked both the substance of the 1866 Act and the meaning of the new Privileges or Immunities Clause of the Fourteenth Amendment to the rights protected under the Privileges and Immunities Clause of Article IV and described in Corfield. To be sure, as Bickel stresses, the moderate Republicans whose votes were needed to secure a two-thirds majority would not have supported a sweeping provision outlawing all forms of racial discrimination, n50 but the focus was on the distinction between civil [*962] rights (meaning privileges and immunities, as interpreted in Corfield), social rights, and political rights. The formula adopted by the Joint Committee responded to the moderates' principal concern (that the Amendment might extend to blacks the right to vote) but it did not weaken the Amendment's application to basic civil rights, the common law rights possessed by all free persons. Whether segregation of schools, transportation, or places of public accommodation represented an inequality with respect to those rights was not debated or resolved in 1866. As will be seen, the issue arose soon after ratification and was debated at length. Those later debates, rather than the debates of 1866, hold the real answer to the segregation question.

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n49. Bickel, supra note 6, at 57.

n50. Id. at 57-58.

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B. School Desegregation at the State Level

Although it is true that most states maintained segregated schools both before and after ratification of the Fourteenth Amendment, it is not true that this passed without comment or controversy. Indeed, the first attacks on racially segregated education occurred at the state level, in both the South and the North. Developments in the two regions, however, were so different that they must be considered separately.

1. Southern States

Because no state that had seceded could be readmitted to the Union until Congress had examined its state constitution and ruled that it was "in conformity with the Constitution of the United States in all respects," n51 the issue of segregation had to be faced more immediately and more explicitly in the South than in the North. The Southern states followed a consistent pattern: drafting constitutions for review in Congress that either explicitly outlawed school segregation or were, at a minimum, silent on the subject, while (with few exceptions) instituting segregation as a matter of state statute or local policy.

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n51. Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867). Tennessee was readmitted before passage of the Act, and is therefore the only Confederate state to be readmitted under its antebellum state constitution, amended to abolish slavery. S. Con. Res. 73, 39th Cong., 1st Sess., 14 Stat. 364 (1866).

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Delegates to virtually every Southern state constitutional convention argued that desegregated education was necessary to comply with the new national norms of equality. n52 A state representative in North Carolina, for example, stated that he "would prefer that the two races should not be educated together," but that the new state constitution, written pursuant to Reconstruction principles, "had neither the word "white' nor the word "black' in it, and therefore class legislation, so far as mere color is concerned, was gone forever." n53 Significantly, no constitutional convention of a Southern state seeking readmission to the Union openly adopted a policy of racially segregated education. Although amendments to this effect were proposed, they were uniformly rejected. n54 This presumably is attributable to a belief that such a policy would doom readmission. During congressional debate over Arkansas, the first state to seek readmission after passage of the Reconstruction Act, an amendment to permit the state to establish segregated schools was defeated in the Senate by an overwhelming vote of 5-30. n55 No such attempt was made again. Three states (Texas, Mississippi and Virginia) were readmitted upon the stipulation "that the constitution of [the state] shall never be so amended as to deprive any citizen or class of

citizens of the United States of the school rights and privileges secured by the constitution of said [*964] State." n56 In other instances, the school segregation issue went unaddressed.

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n52. Frank & Munro, supra note 9, at 459; see also Foner, supra note 21, at 322 (noting that in every state black delegates successfully opposed constitutional language requiring segregation in education).

n53. Remarks of Rep. Sweatt, quoted in Legislature of North-Carolina, Weekly North-Carolina Standard, July 22, 1868, at 4, quoted in Nelson, supra note 9, at 133.

n54. See, e.g., Official Journal of the Constitutional Convention of the State of Alabama 237-38, 242 (1868); Journal of the Proceedings of the Constitutional Convention of the People of Georgia 151, 558 (1867); Journal of the Proceedings in the Constitutional Convention of the State of Mississippi, 1868, at 316-18, 479-80 (1871); Edgar W. Knight, The Influence of Reconstruction on Education in the South 22 (1923) (describing North Carolina's constitutional convention); Journal of the State of Virginia Constitutional Convention 299-301 (1867).

n55. Cong. Globe, 40th Cong., 2d Sess. 2748 (June 1, 1868). The amendment, proposed by Missouri Unionist Senator John Henderson, provided that "no person on account of race or color shall be excluded from the benefits of education, or be deprived of an equal share of the moneys or other funds created or used by public authority to promote education in said State." Id. Henderson offered the amendment as a substitute for a provision that "there shall never be in said State any denial or abridgment of the elective franchise, or of any other right, to any person by reason or on account of race or color, excepting Indians not taxed." Id. He explained that unless his amendment were adopted, the provision would deny the state the authority "to provide separate schools for whites and blacks." Id.

n56. Act of Mar. 30, 1870, ch. 39, 16 Stat. 81 (Texas); Act of Feb. 23, 1870, ch. 19, 16 Stat. 68) (Mississippi); Act of Jan. 26, 1870, ch. 10, 16 Stat. 63 (Virginia).

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In 1867, Senator Charles Sumner of Massachusetts, who had argued against school segregation as a lawyer in 1850 and would later be the champion of the Civil Rights Act of 1875, proposed legislation that would compel the states of the former confederacy to establish "public schools open to all, without distinction of race or color." n57 The proposal evenly split the Senate (by a vote of 20-20 n58) and thus did not carry, but it was a show of strength for Sumner's position. The vote does not, however, cast much light on the meaning of the Fourteenth Amendment, because the Amendment had not yet been ratified and the source of congressional authority was likely some combination of the war power and the Guarantee Clause. n59

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n57. Cong. Globe, 40th Cong., 1st Sess. 165 (Mar. 16, 1867).

n58. Id. at 170.

n59. A similar proposal, also made by Sumner, was later ruled out of order. Id. at 581 (July 11, 1867).

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Two Southern states, Louisiana and South Carolina, explicitly prohibited racially segregated public education. Louisiana's Constitution of 1868 provided:

All children of this State between the years of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the State in common, without distinction of race, color, or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana. n60

South Carolina's Constitution of 1868 provided that "all the public schools, colleges and universities of this State ... shall be free and open to all the children and youths of the State, without regard to race or color." n61 Less explicitly, Florida's Constitution of 1868 provided that "it is the paramount duty of the State to make [*965] ample provision for the education of all the children residing within its borders, without distinction or preference." n62 This appears to have outlawed school segregation without calling attention to the fact. n63 Alabama adopted a provision almost identical to that of Iowa, which was interpreted by the Iowa courts as outlawing segregation. n64 A motion to require school boards to make "proper provision" for "the education of the children of white and colored persons in separate schools" was defeated. n65 Other Southern states repealed earlier education provisions of their state constitutions containing express racial distinctions, replacing them with provisions containing neither explicit nor implicit reference to the race question. n66 Conservatives charged that these provisions would lead to mixed schools. n67

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n60. La. Const. of 1868, tit. VII, art. 135, reprinted in 3 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America 1449, 1465 (Francis N. Thorpe ed. 1909) [hereinafter Constitutions].

n61. S.C. Const. of 1868, art. X, 10, reprinted in 6 Constitutions, supra note 60, at 3281, 3300.

n62. Fla. Const. of 1868, art. IX, 1, reprinted in 2 Constitutions, supra note 60, at 704, 716.

n63. In 1873, the Florida legislature passed a statute forbidding any racial distinction in the full and equal enjoyment of public schools, conveyances, accommodations, and amusements. Act of Jan. 25, 1873, 1873 Fla. Laws ch. 1947, 1.

n64. Ala. Const. of 1867, art. XI, 6, reprinted in 1 Constitutions, supra note 60, at 132, 149; see Clark v. Board of Directors, 24 Iowa 266, 274 (1868).

n65. Horace M. Bond, Negro Education in Alabama: A Study in Cotton and Steel 93 (1939).

n66. Compare Tex. Const. of 1866, art. X, 2, reprinted in 6 Constitutions, supra note 60, at 3569, 3588-89 and Act of Feb. 6, 1867, No. 35, 5, 1867 Ark. Acts 100 (containing express racial distinctions) with Tex. Const. of 1868, art. IX, 1, reprinted in 6 Constitutions, supra note 60, at 3591, 3609 and Ark. Const. of 1868, Art. IX, 6, reprinted in 1 Constitutions, supra note 60, at 306, 323 (including no racial distinctions).

n67. See Thomas S. Staples, Reconstruction in Arkansas 245 (Studies in History, Economics & Public Law Vol. 59, 1923) (noting that conservatives denounced the school provision in the 1868 constitution, which removed all mention of separate schools, as requiring schools in which there would be " "indiscriminate social intercourse between whites and blacks' ") (citation omitted in original).

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But constitutional language and actual practice were far apart. Shortly after gaining readmission with colorblind state constitutions, most Southern state legislatures enacted laws permitting or requiring segregated schools, n68 and Congress had no authority (or no inclination) to review the domestic legislation of sovereign states. n69 One state, Tennessee, was so bold as to revise its state [*966] constitution after readmission to require segregated schools. n70 (The other Southern states waited until after Reconstruction. n71) Only one major Southern school system, that of New Orleans, was "thoroughly and successfully integrated." n72 Even in South Carolina, with a state constitutional requirement of desegregated education and a strong black political presence, separate schools were universal except in remote areas, where only white schools existed and black children were often given no schooling at all. n73 Generally, it was difficult enough to build, fund, and staff schools for the freedmen, without the additional problems of desegregation. Whites stayed away from "mixed" schools; n74 thus, blacks generally found "separate schools infinitely superior to no schools at all." n75 In Mississippi, according to Henry Pease, who was state Superintendent of Education from 1869-74, "under the law regulating the system the child of the colored man can enter the school where white children are taught, and the laws of the State will protect him," but "not one instance has come to my knowledge where a colored man has attempted to enforce the law in this respect." n76

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n68. For example, Arkansas instituted segregated schools a month after achieving readmission. Act of July 23, 1868, no. 52, 107, 1868 Ark. Acts 196 as amended by Act of Apr. 29, 1873, No. 130, 108, 1873 Ark. Acts 423. See also Act of July 11, 1870, ch. 259, 47, 1870 Va. Acts 413 (providing for segregated education within six months of the congressional vote on readmission).

n69. No one in Congress even protested when the Virginia legislature adopted a mandatory school segregation statute in 1870. Kelly, supra note 21, at 542.

n70. Tenn. Const. of 1870, art. XI, 12, reprinted in 6 Constitutions, supra note 60, at 3448, 3469 ("No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school.").

n71. See Ala. Const. of 1875, art. XII, 1, reprinted in 1 Constitutions, supra note 60, at 153, 176; Fla. Const. of 1885, art. XII, 12, reprinted in 2 Constitutions, supra note 60, at 732, 754; Ga. Const. of 1877, art. VIII, 1, reprinted in 2 Constitutions, supra note 60, at 842, 868; La. Const. of 1898, art. 248, reprinted in 2 Constitutions, supra note 60, at 1522, 1575; Miss. Const. of 1890, art. 8, 207, reprinted in 4 Constitutions, supra note 60, at 2090, 2115; N.C. Const. of 1876, art. IX, 2, reprinted in 4 Constitutions, supra note 60, at 2822, 2838; S.C. Const. of 1895, art. XI, 7, reprinted in 6 Constitutions, supra note 60, at 3307, 3339; Tex. Const. of 1876, art. VII, 7, reprinted in 6 Constitutions, supra note 60, at 3621, 3644; Va. Const. of 1902, art. IX, 140, reprinted in 7 Constitutions, supra note 60, at 3904, 3934.

n72. Foner, supra note 21, at 367; C. Vann Woodward, The Strange Career of Jim Crow 24 (3d rev. ed. 1974). The New Orleans schools remained integrated until 1877, when Reconstruction came to an end. For a description of the success of desegregation in Louisiana, see 2 Cong. Rec. app. 478-79 (June 16, 1874) (statement of Rep. Darrall). For a more ambivalent assessment, see Gillette, supra note 18, at 195.

n73. Williamson, supra note 21, at 222.

n74. Meyer Weinberg, A Chance To Learn: The History of Race and Education in the United States 51 (1977); Williamson, supra note 21, at 216-17; Woodward, supra note 72, at 24-25.

n75. Foner, supra note 21, at 367 (quoting Frederick Douglass' New National Era).

n76. 2 Cong. Rec. 4154 (May 22, 1874).

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The evidence thus shows that during Reconstruction, antisegregation forces in Congress were strong enough to block overt state constitutional measures permitting or requiring segregated schools, and in some cases strong enough to force states to embrace school desegregation as a matter of formal policy. This shows at least some degree of concern about school segregation as a constitutional issue. In most cases, however, the Southern states could satisfy federal demands by silence or studied ambiguity about segregation, since Congress lacked sufficient energy or will to pursue the matter to the extent of actual enforcement.

2. Northern States: Antebellum Practice and Post-War Legislative Action

Even in the North, school segregation was widespread before the Civil War. It has been estimated that 90% of the 28,000 black children attending Northern

schools in 1860 attended all-black schools, n77 and many more black children were denied admission to public schools altogether. n78 Nonetheless, agitation against segregated education began in the 1840s, through political action, petitions, mass meetings and school boycotts by black pupils. The first desegregation lawsuit was filed in 1850 by abolitionist lawyer and future Senator Charles Sumner, who represented black plaintiffs in a suit against separate but equal public schools in Massachusetts, Roberts v. City of Boston. n79 Sumner argued that "the separation of children in the public schools of Boston, on account of color or race, is in the nature of caste, and is a violation of equality." n80 With the insouciance toward niceties of legal doctrine that later characterized his fight for the Civil Rights Act of 1875, Sumner appealed [*968] broadly to "the spirit of American institutions, and especially of the constitution of Massachusetts." n81 Sumner maintained that

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n77. Weinberg, supra note 74, at 26.

n78. See, e.g., Lewis v. Henley, 2 Ind. 332, 334-35 (1850); Chalmers v. Stewart, 11 Ohio 386 (1842) (holding that admission of black children to the public school is unlawful).

n79. 59 Mass. (5 Cush.) 198 (1850). On the background of the case, see Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780-1860, at 176-79 (1983); Kull, supra note 15, at 40-52; Roderick T. Baltimore & Robert F. Williams, The State Constitutional Roots of the "Separate But Equal" Doctrine: Roberts v. City of Boston, 17 Rutgers L.J. 537 (1986). Previously, the schools of Lowell, Nantucket, New Bedford, Worcester and Salem had integrated as a result of political action. See Kaestle, supra, at 177.

n80. Roberts, 59 Mass. (5 Cush.) at 202.

n81. Id. at 201.

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the separate school inflicts upon [colored children] the stigma of caste; and although the matters taught in the two schools may be precisely the same, a school exclusively devoted to one class must differ essentially, in its spirit and character, from the public school known to the law, where all classes meet together in equality. n82

In a unanimous decision delivered by Chief Justice Lemuel Shaw, the Supreme Judicial Court rejected Sumner's argument, concluding that discretion in the matter was vested in the school committee, and that the Board's conclusion that the best interests of both races would be served by segregation was "the honest result of their experience and judgment." n83 The legislature promptly responded, however, with legislation ending the segregation of Massachusetts schools. n84

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n82. Id. at 203.

n83. Id. at 209.

n84. Act of Apr. 28, 1855, ch. 256, 1, 1855 Mass. Acts 674.

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In Minnesota, Maine, New Hampshire, and Vermont, all states with tiny black populations, the schools had never been segregated. n85 Connecticut and Rhode Island had no state laws permitting segregation, but it was practiced in some local schools. n86 In most of the Northern states outside of New England, racial segregation was either allowed or required in the public schools until after the Civil War. n87 In 1866, some efforts were made in Illinois to bring desegregation to the public schools by political means, n88 and elsewhere lawsuits were filed challenging school segregation under the newly enacted Civil Rights Act of 1866. n89

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n85. Act of Mar. 3, 1864, ch. IV, 1, 1864 Minn. Laws 25-26 (Minnesota); Segregation and the Fourteenth Amendment in the States 248 (Bernard D. Reams, Jr. & Paul E. Wilson eds. 1975) [hereinafter Segregation] (Maine); id. at 388 (New Hampshire); id. at 680 (Vermont).

n86. Segregation, supra note 85, at 60 (Connecticut); id. at 548-50 (Rhode Island).

n87. Kaestle, supra note 79, at 179.

n88. Robert L. McCaul, The Black Struggle for Public Schooling in Nineteenth-Century Illinois 67-72, 83-85, 108-42 (1987); Nelson, supra note 9, at 134.

n89. Nelson, supra note 9, at 134.

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Some Northern state legislatures (New Jersey, Rhode Island, Michigan, Connecticut and Illinois) desegregated their schools [*969] shortly after ratification of the Fourteenth Amendment, n90 but most Northern states were slow to act. They may not have fully recognized that the new Amendment would force the North to change as well as the South. Many Northerners assumed that the Thirteenth and Fourteenth Amendments were for the reconstruction of the rebel states, not of their own. n91 Moreover, at least after 1870, the focus of antisegregation political activity, especially by African-Americans, was on obtaining nationwide relief through what would be the Civil Rights Act of 1875. This distracted from efforts at the state level. n92

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n90. See N.J. Const. of 1844, art. II, 1, reprinted in Segregation, supra note 85, at 395; Act of Mar. 7, 1866, ch. 609, 1866 R.I. Acts & Resolves 186; Act of Feb. 28, 1867, No. 34, 28, 1867 Mich. Pub. Acts I 42, 43; Act of Aug. 1, 1868, ch. 108, 1, 1868 Conn. Pub. Acts 206; Act of Apr. 1, 1872, Schools, 48,

1872 Ill. Laws 700, 720-21. Michigan made the prohibition of separate schools even more explicit in 1871, Act of Apr. 17, 1871, No. 170, 28, 1871 Mich. Pub. Acts I 271, 274, as did New Jersey in 1881, Act of Mar. 23, 1881, ch. 149, 1, 1881 N.J. Laws 186.

n91. See Cong. Globe, 39th Cong., 1st Sess. 1761 (statement of Sen. Trumbull) (Apr. 4, 1866) (the 1866 Act "could have no operation in Massachusetts, New York, Illinois, or most of the states of the Union"); id. at 474 (statement of Sen. Trumbull) (Jan. 29, 1866) (commenting that the impetus for the 1866 Act was the behavior of the "insurrectionary states"); see generally Nelson, supra note 9, at 111 ("inhabitants of "good' states would never sense that the act applied to them"); Kaczorowski, supra note 29, at 881 (describing the perception by Northern whites of civil rights enforcement as a Southern problem).

n92. McCaul, supra note 88, at 110.

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In four Western or Midwestern states (Nevada, Kansas, Indiana and California), laws creating or recognizing school segregation were passed even after ratification of the Fourteenth Amendment, n93 which strongly suggests that in those states the Amendment was not initially understood to foreclose school segregation (at least outside the South). School segregation laws were also passed in Kentucky and Maryland, former slaveholding states that rejected the Fourteenth Amendment, n94 and in their fellow border [*970] states, Missouri and West Virginia, where resistance to civil rights was almost equally strong. n95

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n93. Act of Mar. 8, 1867, ch. 52, 50, 1867 Nev. Stat. 89, 95; Act of Mar. 3, 1868, ch. 18, art. 1, 75, 1868 Kan. Sess. Laws 129, 146; Act of May 13, 1869, ch. 16, 2, 1869 Ind. Acts 41; Act of Apr. 4, 1870, ch. 556, 56, 1870 Cal. Stat. 824, 839. The Kansas legislation applied only to cities of more than 15,000 inhabitants. See infra text accompanying notes 130-32.

n94. Act of Mar. 22, 1904, ch. 85, 1904 Ky. Acts 181-82; Act of Mar. 30, 1868, ch. 407, tit. 1, ch. 9, 1, 1868 Md. Laws 745, 766. In these states, which had not seceded from the Union and had not been subject to the Emancipation Proclamation, slavery did not end until ratification of the Thirteenth Amendment. Not having been through Reconstruction, Kentucky was probably the state with greatest political resistance to the principles of the Fourteenth Amendment.

n95. Mo. Const. of 1875, art. XI, 3, reprinted in 4 Constitutions, supra note 60, at 2229, 2263; W. Va. Const. of 1872, art. XII, 8, reprinted in 7 Constitutions, supra note 60, at 4033, 4061.

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Within a decade, however, opinion had changed. Almost all Northern states abolished school segregation by the end of the 1880s. n96 Although it is not always possible to know why this happened, in at least one state desegregation was expressly linked to the demands of the Fourteenth Amendment. When Pennsylvania repealed its law allowing school segregation in 1881, the sponsor

of the repealing legislation stated:

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n96. See, e.g., Act of Apr. 1, 1872, Schools, Sec. 1, 48, 1872 Ill. Laws 700, 720-21; Act of Feb. 28, 1867, No. 34, 28, 1867 Mich. Pub. Acts I 42, 43; Act of Mar. 23, 1881, Ch. 149, 1, 1881 N.J. Laws 186; Act of Apr. 9, 1873, ch. 186, 1, 1873 N.Y. Laws 303; Act of Feb. 22, 1887, House Bill No. 71, 1, 1887 Ohio Laws 34; Act of June 8, 1881, No. 83, 1, 1881 Pa. Laws 76. The New York statute, which provided that all citizens were entitled to the "full and equal enjoyment of any accommodation, advantage, facility or privilege" furnished by school authorities, was interpreted in 1883 as allowing separate but equal schools. People ex rel. King v. Gallagher, 93 N.Y. 438, 456-57 (1883). The legislature did not again abolish segregation until 1900. Act of Apr. 18, 1900, ch. 492, 1, 1900 N.Y. Laws II 1173. Even then, the legislation appears to have exempted rural districts from the desegregation requirement. See Bickel, supra note 6, at 37 & n.71. Indiana did not repeal its school segregation law until 1949. See Act of Mar. 8, 1949, ch. 186, 1, 1949 Ind. Acts 603, 604.

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In proposing the repeal of the act of 1854, which in terms would be prohibited by the present State and Federal Constitutions, it seems a matter of surprise that an act so directly in conflict with the Fourteenth and Fifteenth Amendments of the Constitution of the United States should have been permitted to have remained in the statute book until this time. n97

Similarly, two successive governors of Ohio advocated school desegregation legislation in language borrowed from the federal constitution, declaring separate schools to be "a badge of servitude" and a denial of "equal privileges," n98 and stating that the legislation would give "our colored fellow citizens ... the enjoyment of the rights of citizenship that other citizens have." n99 At the same time, however, the chief sponsor of the desegregation legislation in [*971] the Ohio House of Representatives (Benjamin Arnett, an African-American), delivered a speech containing twelve principal arguments which, while including "the teachings of the Son of Man and God and the Golden Rule," did not mention the possibility that the status quo was in violation of the federal Constitution. n100

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n97. Penn. Senate Journal (May 26, 1881) (statement of Sen. Sill).

n98. Inaugural Address of Governor Hoadley (1884), quoted in Frederick A. McGinnis, The Education of Negroes In Ohio 59 (1962).

n99. Inaugural Address of Governor Foraker (1886), quoted in McGinnis, supra note 98, at 60.

n100. Benjamin W. Arnett & Jere A. Brown, The Black Laws, Speeches 15-17 (1887), quoted in McGinnis, supra note 98, at 60-61.

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3. Northern States: Early Judicial Interpretation

The standard account relies heavily on what is said to be the "nearly unanimous judicial response" among state courts during Reconstruction "that the recent constitutional amendments made no difference to the existing law of segregation." n101 This account essentially echoes the rhetorically effective claim made by the Plessy majority that "the establishment of separate schools for white and colored children ... has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced." n102 This picture of school segregation litigation in the Northern states, however, is highly misleading.

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n101. Kull, supra note 15, at 95.

n102. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

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Between 1868 and 1883, the issue of school segregation reached the supreme courts of nine Northern states. Far from being unanimous, the opinions were almost evenly split, with five upholding segregation and four striking it down. n103 Admittedly, with few exceptions, the cases holding school segregation unlawful were decided under state law, while the cases holding school segregation lawful generally reached the federal constitutional issue and held that school segregation is consistent with the Fourteenth Amendment. This creates the impression of unanimity on the federal constitutional question. But we must bear in mind that proper legal practice, and in some cases jurisdictional requirements, led state courts to consider issues of state law first, and if they found a basis in state law for invalidating segregation there was no need to [*972] address federal law. n104 Only if a court was willing to say that segregation was lawful under state law did it reach the Fourteenth Amendment issue. When a state court interpreted equality language in its own state constitution or statutes as prohibiting segregation, it may be fair to infer that the court would have given the Fourteenth Amendment a similar construction had it reached the federal constitutional issue. The strength of this inference depends, of course, on the language being interpreted.

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n103. California, Indiana, Nevada, New York and Ohio upheld segregation, whereas Illinois, Iowa, Kansas and Michigan held segregation to be unlawful. See infra notes 104-37 and accompanying text.

n104. See People ex rel. Longress v. Board of Educ., 101 Ill. 308, 316 (1882); Board of Educ. v. Tinnon, 26 Kan. 1, 16-18 (1881) (each mentioning the federal constitutional argument but looking to state law as the actual ground of decision).

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The first state supreme court decision on school segregation after the Civil War was Clark v. Board of Directors, n105 rendered by the Supreme Court of Iowa in 1868, shortly before the completion of ratification of the Fourteenth Amendment. Because the Amendment was not yet effective, the federal constitution was not at issue. The court held racial segregation unconstitutional under a vaguely worded provision of the Iowa Constitution of 1857 requiring the school board to "provide for the education of all the youths of the State, through a system of common schools." n106 The court declared the principle that "all the youths are equal before the law" and concluded that the board of education could not "in their discretion, or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing or the like." n107 The court acknowledged the school board's argument that " "public sentiment in their district is opposed to the intermingling of the white and colored children in the same school,' " n108 but held that to require students of any particular class or origin to attend a separate school "would be to sanction a plain violation of the spirit of our laws not only, but would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races." n109 In 1873, in its first segregation case after ratification of the Amendment, the Iowa Supreme Court explicitly associated the principle of Clark with the new Amendment, and [*973] extended the requirement of desegregation to common carrier transportation. n110

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n105. 24 Iowa 266 (1868).

n106. Iowa Const. of 1857, art. 9, 12, reprinted in 2 Constitutions, supra note 60, at 1136, 1150.

n107. 24 Iowa at 277.

n108. Id. at 276.

n109. Id.

n110. Coger v. North W. Union Packet Co., 37 Iowa 145, 153-55 (1873).

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In 1869, just after completion of ratification, the Michigan Supreme Court held racial segregation unlawful under a Michigan statute providing that " "all residents of any district shall have an equal right to attend any school therein.' " n111 The opinion, which was written by Chief Justice Thomas Cooley, the most celebrated constitutional scholar and judge of the last half of the nineteenth century, relied entirely on the state statute. In the last sentence of the opinion, Cooley made what appears to be an oblique reference to the Fourteenth Amendment, but pointed out: "As the statute of 1867 is found to be applicable to the case, it does not become important to consider what would otherwise have been the law." n112

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n111. People ex rel. Workman v. Board of Educ., 18 Mich. 399, 408-09 (1869) (citing Act of Feb. 28, 1867, No. 34, 28, 1867 Mich. Pub. Acts I 42, 43).

n112. Id. at 414.

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In 1872, by contrast, the Ohio Supreme Court rendered an opinion squarely upholding segregated schools under the Fourteenth Amendment. In State ex rel. Garnes v. McCann, n113 the Ohio court declined to hold that racial segregation works a "substantial inequality of school privileges between the children of both classes." n114 According to the court, "equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school." n115 This opinion carried particular weight because it was rendered in a generally progressive state by a court composed entirely of Republicans. n116 In the same year, the Nevada Supreme Court stated, in dictum, that a statute establishing separate schools for "Negroes, Mongolians and Indians" violated the "spirit" but did not violate the "letter" of the United States Constitution. n117 In 1874, the supreme courts of California [*974] and Indiana held that exclusion of black children from school on account of race would violate the Equal Protection Clause, but that a policy of separation of the races for educational purposes on equal terms was constitutional. n118 These decisions carried less weight than did the Ohio decision. California had not ratified the Fourteenth Amendment, Indiana was notoriously the most racist of the Northern states, and both courts were dominated by Democrats, the party hostile to Reconstruction. n119 Indeed, the author of the Indiana opinion had issued a decision three years earlier holding the Civil Rights Act of 1866 unconstitutional. n120

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n113. 21 Ohio St. 198 (1872).

n114. Id. at 211.

n115. Id.

n116. See J. Morgan Kousser, Dead End: The Development of Nineteenth-Century Litigation on Racial Discrimination in Schools 19 (1986).

n117. State ex rel. Stoutmeyer v. Duffy, 7 Nev. 342, 346 (1872). The statement is dictum because the court ordered relief for the excluded black child on state constitutional grounds. Id. at 346-47. Although the case involved exclusion rather than segregation, the court explained that under state law school authorities "may not deny to any resident person of proper age an equal participation in the benefits of the common schools"; however, the authorities would be permitted "to send all blacks to one school, and all whites to another; or, without multiplying words, to make such a classification ... as may seem to them best." Id. at 348.

n118. Ward v. Flood, 48 Cal. 36, 51-52 (1874); Cory v. Carter, 48 Ind. 327, 361-62 (1874).

n119. See Kousser, supra note 116, at 19-21.

n120. State v. Gibson, 36 Ind. 389, 402-03 (1871).

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Two years after Garnes, the Illinois Supreme Court, with only one dissent, interpreted a provision of state law requiring that the state provide "all" the children of the State with an "equal" education as prohibiting a school board from setting up a separate school for the four black children in the district. n121 The attorneys for the school board cited the Garnes decision for the proposition that a requirement of "equality" is not inconsistent with segregation, n122 but the Illinois court - notwithstanding its 5-2 Democratic majority n123 - found the rationale of Garnes unpersuasive. The "free schools of the State are public institutions," the court reasoned, and although their directors "have large and discretionary powers in regard to the management and control of schools, ... they have no power to make class distinctions, neither can they discriminate [*975] between scholars on account of their color, race or social position." n124

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n121. Chase v. Stephenson, 71 Ill. 383, 385 (1874). The court declined to address whether separate schools would have been lawful "had the district contained colored children sufficient for one school, and white children for another." Id. at 385-86. Such a case could theoretically present a different question, because the plaintiffs in Chase were white taxpayers who complained of the expense of building and staffing a separate school when the facilities of the white school were adequate for the education of the black children as well. The prohibition on segregation was extended to all schools in People ex rel. Longress v. Board of Education, 101 Ill. 308 (1882).

n122. McCaul, supra note 88, at 132.

n123. Id. at 131. A Democratic justice, Alfred M. Craig, wrote the opinion in Chase.

n124. Chase, 71 Ill. at 385.

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With the exception of a New York case in 1883, n125 no court in any other Northern state upheld school segregation after 1874. The legislatures of California n126 and Ohio n127 reversed the judicial decisions upholding segregation and banned separate schools in 1880 and 1887, respectively. A lower court in Pennsylvania held in 1881 that education is a privilege or immunity of United States citizens and that segregation, being "the very personification of caste" is therefore unconstitutional. n128 Because of enactment of desegregation legislation a few months later, however, this decision, which is the only explicit judicial holding that school segregation violates the Fourteenth Amendment, was never appealed. n129 The same year, the Kansas Supreme Court struck down the segregation policy of a local school board. n130 Although it never reached the Fourteenth Amendment argument, the court devoted a page of its opinion to discussing why the constitutionality of segregated schools "may be doubted," n131 and engaged in a lengthy discussion of why it was "better for

the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other." n132

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n125. People ex rel. King v. Gallagher, 93 N.Y. 438 (1883).

n126. Cal. Political Code, 1662 (as amended Apr. 7, 1880 & Mar. 12, 1885); see Wysinger v. Crookshank, 82 Cal. 588 (1890). Note, however, that the 1885 amendment to the Code gave school boards power to establish separate schools for children of Chinese or Mongolian descent. Act of Mar. 12, 1885, ch. 117, 1, 1885 Cal. Stat. 99, 100. This amendment was approved just nine days after the California Supreme Court held that 1662 did not allow teachers to exclude Chinese students from public schools. Tape v. Hurley, 66 Cal. 473 (1885).

n127. Act of Feb. 22, 1887, House Bill No. 71, 1, 1887 Ohio Laws 34.

n128. Commonwealth ex rel. Allen v. Davis, 10 Weekly Notes of Cases (Pennsylvania) 156, 159-60 (1881). The case is discussed in Kousser, supra note 116, at 21-22. For a complete listing of school desegregation litigation in the nineteenth century, see id. at 56-58.

n129. Kousser, supra note 116, at 22.

n130. Board of Educ. v. Tinnon, 26 Kan. 1 (1881).

n131. Id. at 17-18. The dissenter, future United States Supreme Court Justice David J. Brewer, interpreted this dictum as a statement of the court's opinion on the constitutional issue, and expressed his disagreement with it. Id. at 23-24 (Brewer, J., dissenting).

n132. Id. at 19.

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It bears mention that the focus of nineteenth-century civil rights litigation was on equal rights rather than on governmental discrimi [*976] nation or wrongdoing. The issue posed would be whether a black child had a right to be admitted to a particular school without regard to his race, not whether the state behaved wrongfully in establishing a separate school. Thus, even when black children won lawsuits entitling them to admission to the (formerly) "white" school, the state remained free to operate separate schools for black children. Unless or until there was political pressure for reform, civil rights could be enforced only person-by-person, at considerable expense. Thus, even in the North, separate schools remained widespread even after the right to desegregated schooling was established. n133

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n133. See Weinberg, supra note 74, at 64-80.

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Moreover, even as the Northern states approached consensus on the proposition that requiring black children to attend racially separate schools

is a violation of their right to equality in education, the national picture was more clouded than ever. As will be recounted in detail below, the congressional effort to end school segregation under authority of the Fourteenth Amendment collapsed in 1875. Reconstruction came to a close in 1877, and the Southern states moved quickly and unanimously toward a system of de jure segregated education - to be followed a decade later by segregation throughout the Southern economy and public life. In light of the retreat from federal enforcement of civil rights, it became difficult to sustain the argument that federal law required desegregation. In 1882, Federal Circuit Court Judge John Baxter, an opponent of school segregation, concluded reluctantly that Ohio's segregated schools were not unconstitutional (though he insisted upon a degree of material equality among the separated schools that was unheard of again until the 1940s, and that resulted in substantial desegregation of Ohio schools). n134 Similarly, Justice Cooley, who had held segregation of the Detroit schools unlawful in 1869, n135 wrote in the 1880 edition of his constitutional law trea [*977] tise that under the Fourteenth Amendment, "it seems to be admissible to require colored persons to attend separate schools, provided the schools are equal in advantages, and the same measure of privilege and opportunity is afforded in each." n136

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n134. See United States v. Buntin, 10 F. 730, 735-36 (C.C.S.D. Ohio 1882). Newspaper accounts reported Judge Baxter's statement that he

"had come to the conclusion, after much deliberation, that the [state segregation] statute was constitutional, yet he did not desire to be understood as saying that he approved of the law which recognized separate schools, because he believed it would be far better policy for the State to remove such irritating differences."

Springfield Daily Republic, Nov. 4, 1882, quoted in Kousser, supra note 116, at 25.

n135. See People ex rel. Workman v. Board of Educ., 18 Mich. 399 (1869).

n136. Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 230-31 (Boston, Little, Brown 1880).

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The experience in the Northern states during the fifteen year period after ratification of the Fourteenth Amendment thus falls short of proving that school segregation was understood to violate the Amendment, but it is also inconsistent with the equally extreme view that the Amendment had no bearing on the issue. Confronting the Fourteenth Amendment for the first time, five Northern state supreme courts (those of California, Indiana, Nevada, New York and Ohio) upheld segregation of public schools, while another four Northern state supreme courts (those of Illinois, Iowa, Kansas and Michigan) held segregation unlawful. As the implications of the new constitutional regime came to be more fully understood in the North, segregation eventually was prohibited, either by legislative or judicial action, in every state. n137

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n137. This is not to say that de jure segregation was eliminated in the North. Segregation survived in many areas, including southern Illinois, southern New Jersey, and parts of rural Ohio, despite legislation and judicial rulings. See Kousser, supra note 116, at 7 n.23; McGinnis, supra note 98, at 64-70; Weinberg, supra note 74, at 68-71, 75-76.

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C. The District of Columbia

The single piece of evidence most often cited in support of the proposition that the framers of the Fourteenth Amendment did not deem school segregation unconstitutional is the fact that the schools of the District of Columbia, under the direct constitutional authority of Congress, remained segregated by law during the entire period of proposal, ratification, and enforcement of the Amendment (and indeed remained segregated until after Brown). In 1862, shortly after emancipation in the District, Congress passed statutes "initiating a system of education of colored children," to be financed by a special tax on property "owned by persons of color." n138 Prior to that time, there were no publicly supported schools for black children in the District. n139 In 1864, Congress [*978] abolished the special tax and required the school authorities to use a proportionate share of the common school funds for the education of black children, evidently assuming that the schools would be separate. n140 The Fourteenth Amendment was proposed in 1866 and in the same year, Congress made appropriations for the two separate school systems without reexamining the segregation issue. n141

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n138. Act of May 20, 1862, ch. 77, 35, 12 Stat. 394, 402 (County of Washington); Act of May 21, 1862, ch. 83, 1, 12 Stat. 407 (Cities of Washington and Georgetown).

n139. See Cong. Globe, 36th Cong., 1st Sess. 1677-87 (Apr. 12, 1860).

n140. Act of June 25, 1864, ch. 156, 18, 23, 13 Stat. 187, 191, 193.

n141. Act of July 28, 1866, ch. 296, 14 Stat. 310, 316 (appropriations act for various civil expenses); Act of July 28, 1866, ch. 308, 14 Stat. 343 (1866) (granting land for colored schools within the district). Neither bill was seriously debated.

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In 1870, eighteen months after ratification of the Amendment, Senator Sumner introduced legislation that would eliminate separate schools in the District. n142 The trustees of the separate black school system issued a formal report supporting desegregation on the ground that this would be in "the best interests of the colored people" as well as "those of all classes." n143 Neither Sumner nor the trustees treated the issue as one of constitutional obligation (perhaps because the newly ratified Fourteenth Amendment did not apply to either the national government or, consequently, to the District of Columbia). The

trustees stated that they regarded it "as but a question of time" that the "custom of separation on account of color must disappear from our public schools, as it has from our halls of justice and of legislation," but acknowledged that "whether this unjust, unreasonable, and unchristian discrimination against our children shall continue at the capital of this great Republic is for the wisdom of Congress to determine." n144

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n142. Cong. Globe, 41st Cong., 2d Sess. 323 (Jan. 10, 1870).

n143. Cong. Globe, 41st Cong., 3d Sess. 1055 (Feb. 8, 1871) (quoted in speech by Sen. Sumner).

n144. Id. at 1056.

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On February 8, 1871, the District of Columbia Committee of the Senate, over the objections of its chairman, reported a bill that would have reorganized the public school system of the District and eliminated all racial distinctions in the admission of pupils to the schools. n145 A similar bill was reported in the House of Repre [*979] sentatives, together with an amendment to strike the desegregation clause. n146 Some proponents of the bills argued that desegregation was required by the spirit of the recent constitutional amendments, n147 but for the most part the bills were debated as issues of policy. n148 The sponsor of the amendment to strike the desegregation requirement stressed repeatedly that he did "not differ with the [proponents of the bill] as to principle, but as to policy, in this matter." n149 He believed that immediate desegregation would "destroy the schools of the city, or ... put them back at least ten or fifteen years" and that desegregation should be postponed until the black children had been given a certain degree of education and the prejudice against them, which he described as "transitory," had passed away. n150 Another opponent asked: "Is it a crime to be practical?" n151 The Senate bill died without further debate, and the House bill was defeated by a vote of 71-88. n152 A similar effort in the Senate during the next Congress prevailed by a margin of 35-20 on a procedural test, n153 but never came to a final vote. Sumner thereafter devoted his efforts to general civil rights legislation, which would have ended school segregation not only in the District [*980] but nationwide. By the time that effort failed, Republicans had lost control of the Congress, Reconstruction was over, and the question of segregation in District of Columbia schools had disappeared from public attention.

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n145. Id. at 1054 ("No distinction on account of race, color, or previous condition of servitude shall be made in the admission of pupils to any of the schools under the control of the board of education, or in the mode of education or treatment of pupils in such schools."). The chairman of the committee, Sen. Patterson, stated that he "was overruled in the committee in this matter" and proposed an amendment deleting the desegregation provision. Id.

n146. Id. at 1365-66 (Feb. 17, 1871). The bill provided that it shall be the duty of the board of directors

to determine what particular school each scholar shall attend; and no distinction shall be made on account of race or color, so that all unmarried youth resident in the District of Columbia, between the said ages of six and eighteen years, shall be entitled to and receive equal benefits of the public schools of their respective districts.

Id. at 1366.

n147. See, e.g., id. at 1055 (Feb. 8, 1871) (statement of Sen. Harris) ("We have adopted the principle of equality in the Constitution of the United States, and I think this is a proper place to enact a law in accordance therewith."); id. at 1056 (statement of Sen. Carpenter) ("This bill ... declares a principle which is sound if the amendments to the Constitution are correct[,] ... that there shall be no distinction on account of race, color, or previous condition of servitude made in our common schools.").

n148. See, e.g., id. at 1059 (statement of Sen. Revels) (arguing that a law compelling school segregation would encourage racial prejudice).

n149. Id. at 1054 (statement of Sen. Patterson). He later repeated these sentiments. Id. at 1057.

n150. Id. at 1054.

n151. Id. at 1059 (statement of Sen. Tipton).

n152. Id. at 1367 (Feb. 17, 1871).

n153. Cong. Globe, 42d Cong., 2d Sess. 3124 (May 7, 1872).

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The segregation of schools in the nation's capital was a powerful symbol. But as a legal matter it is less significant than may appear. At no time after the Fourteenth Amendment did Congress vote in favor of segregated schools in the District (although Congress appropriated money for the segregated schools that already existed). The sin was one of omission. More importantly, since the Fourteenth Amendment did not apply to congressional legislation, senators were free to vote in accordance with their assessments of practical impact (and even according to their personal preferences about the schools their children attended) rather than according to the perceived dictates of the Constitution. Opponents of desegregation followed a strategy of preventing an up-or-down vote, and extraordinary numbers of representatives and senators failed to vote even on procedural motions. One member said outright that he could not cast a vote that might be interpreted as condoning segregation, but that he preferred that the issue not be raised. n154 To read this as proof that the Congress of the day viewed segregation as constitutionally legitimate is to overread the evidence.

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n154. See Cong. Globe, 41st Cong., 3d Sess. 1058 (Feb. 8, 1871) (statement of Sen. Sawyer).

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D. Segregation in Common Carriers

A final source of evidence regarding the legal conception of segregation at the time of the Fourteenth Amendment involves segregation of transportation common carriers. Even scholars who find the historical argument in favor of Brown implausible acknowledge that "the originalist constitutional argument against racial segregation was always stronger in the public transportation than in the public school context." n155

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n155. Michael J. Klarman, Brown v. Board of Education: Facts and Political Correctness, 80 Va. L. Rev. 185, 191 (1994); see also Earl M. Maltz, "Separate But Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment, 17 Rutgers L.J. 553 (1986). But see Kull, supra note 15, at 96.

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Racial discrimination by common carriers raised a legal issue under the common law even before the Fourteenth Amendment because of the carriers' legal duty to serve all customers equally, [*981] subject only to reasonable restrictions and regulations. Under the common law, the legality of segregation thus depended upon whether a potential passenger's race constituted a "reasonable" ground for distinction. This was usually considered a question of law for the court or for the jury rather than a matter of private business judgment for the railroad. On this reasonableness issue, authorities split. One prominent railroad law treatise, written in 1857, summarized the law as follows:

The company is under a public duty, as a common carrier of passengers, to receive all who offer themselves as such and are ready to pay the usual fare, and is liable in damages to a party whom it refuses to carry without a reasonable excuse. It may decline to carry persons after its means of conveyance have been exhausted, and refuse such as persist in not complying with its reasonable regulations, or whose improper behavior - as by their drunkenness, obscene language, or vulgar conduct - renders them an annoyance to other passengers. But it cannot make unreasonable discriminations between persons soliciting its means of conveyance, as by refusing them on account of personal dislike, their occupation, condition in life, complexion, race, nativity, political or ecclesiastical relations. n156

By contrast, in an often-cited opinion involving the refusal of a black woman to sit at the rear of a railway car, the Pennsylvania Supreme Court held in 1867 that the railroad's racial distinction was reasonable. n157 "The natural separation of the races," the court found, is "an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature." n158 Earlier the same year, however, the Pennsylvania legislature had passed a statute "making it an offence for railroad corporations ... to make any distinction with their passengers, on account of race or color." n159 Earl

Maltz concludes that "in the 1860's the rights of blacks with respect to public transportation were somewhat uncertain. All agreed that blacks could not be totally [*982] excluded from common carriers; the authorities disagreed, however, ... on the segregation issue." n160

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n156. Edward L. Pierce, A Treatise on American Railroad Law 489 (New York, Voorhies 1857) (emphasis added) (footnote omitted).

n157. West Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 212-13 (1867).

n158. Id. at 213.

n159. Act of Mar. 22, 1867, No. 21, 1867 Pa. Laws 38.

n160. Maltz, supra note 155, at 558.

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In its role as legislator for the District of Columbia, Congress took an increasingly strong stand against segregation in public transportation through the 1860s. Between 1863 and 1865, narrow majorities in Congress passed a series of amendments to the charters of railway and streetcar companies operating in the District of Columbia, prohibiting exclusion on grounds of race. n161 Most of these amendments unmistakably prohibited segregated cars as well as outright denial of service (prohibiting exclusion from "any car"). n162 Both proponents and some opponents maintained that black passengers already enjoyed legal protection against discrimination under the common law. Opponents thus argued that the specific amendments were unnecessary, while proponents said they would be useful to guard against judicial misinterpretation. n163 After 1865, support for these amendments in the Senate swelled to over two-thirds. n164 This was on the eve of passage of the Fourteenth Amendment.

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n161. Cong. Globe, 37th Cong., 3d Sess. 1329 (Feb. 27, 1863); Cong. Globe, 38th Cong., 1st Sess. 1156, 1161 (Mar. 17, 1864); id. at 3137 (June 22, 1864); see Maltz, supra note 155, at 558-63.

n162. Cong. Globe, 38th Cong., 2d Sess. 294 (Jan. 17, 1865); Cong. Globe, 38th Cong., 1st Sess. 3131 (June 21, 1864); id. at 1156 (Mar. 17, 1864).

n163. Cong. Globe, 38th Cong., 1st Sess. 3132 (Jun. 21, 1864) (colloquy between Sen. Sumner and Sen. Trumbull); id. at 1158 (Mar. 17, 1864) (colloquy between Sen. Johnson and Sen. Sumner); id. at 1159 (statement of Sen. Morrill).

n164. Cong. Globe, 38th Cong., 2d Sess., 604 (Feb. 6, 1865) (measure approved 26-10); id. at 294 (Jan. 17, 1865) (measure approved 24-6).

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After enactment of the Fourteenth Amendment, a state's decision to treat racial distinctions as "reasonable" could be seen as discriminatory state action, thus transforming a question of common law into a constitutional

issue. The Iowa Supreme Court concluded that "the doctrines of natural law and of christianity forbid that rights be denied on the ground of race or color" n165 and found segregation in common carriers to be a violation of the Privileges or Immunities Clause of the Fourteenth Amendment, which guarantees to "the colored man ... equality with the white man in all affairs of life, over which there may be legislation, or of which the [*983] courts may take cognizance." n166 Other courts continued to follow the line of cases upholding the "reasonableness" of racial distinctions. n167

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n165. Coger v. North W. Union Packet Co., 37 Iowa 145, 154 (1873).

n166. Id. at 155-56.

n167. For a survey of decisions in Pennsylvania, New Jersey, and New York, see David McBride, Mid-Atlantic State Courts and the Struggle with the "Separate But Equal" Doctrine: 1880-1939, 17 Rutgers L.J. 569 (1986).

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Historians disagree about the degree of segregation and desegregation in actual practice during the period following ratification of the Fourteenth Amendment. In his classic study, The Strange Career of Jim Crow, n168 C. Vann Woodward made the surprising case that public transportation was desegregated in actual practice (and not just in legal theory) in most Southern jurisdictions from the early 1870s until 1900. n169 Desegregation was sometimes a result of black-organized boycotts and political action, and perhaps more often of the fact that railroads found it inefficient and expensive to provide duplicate facilities for the two races. n170 Other historians report that desegregation was less common. n171 Actual desegregation, they maintain, was often confined to lower-class accommodations, such as railroad "smoking cars," and a combination of custom, company regulation, and economics often barred black passengers from first class accommodations. n172

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n168. Woodward, supra note 72.

n169. Id. at 33-34 (Virginia); C. Vann Woodward, American Counterpoint: Slavery and Racism in the North-South Dialogue 253 (1964) [hereinafter Woodward, American Counterpoint] (discussing the situation in New Orleans, Charleston, Richmond, Savannah, and Louisville).

n170. Woodward, American Counterpoint, supra note 169, at 253; August Meier & Elliott Rudwick, A Strange Chapter in the Career of "Jim Crow," in 2 The Making of Black America 14, 14-19 (August Meier & Elliott Rudwick, eds., 1976) (Savannah, Georgia).

n171. See Lofgren, supra note 9, at 7-27 (presenting a balanced account of the evidence); Richard C. Wade, Slavery in the Cities: The South, 1820-1860 (1964) (tracing origins of Jim Crow practices to the cities of the South prior to the War); Williamson, supra note 21 (discussing Southern movement toward segregation in the early years after the War); Bruce A. Glasrud, Jim Crow's Emergence in Texas, 15 Am. Stud. 47, 52 (1974) (reporting that racial

segregation was widespread in Texas between 1865 and 1877). Woodward acknowledges the historical dispute in Woodward, American Counterpoint, supra note 169, at 253.

n172. Foner, supra note 21, at 368, 371-72; Lofgren, supra note 9, at 9-17.

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Almost every Southern state passed laws during Reconstruction guaranteeing equal access to transportation and public accommodations, n173 and none mandated segregation by law. The first major [*984] wave of segregation legislation did not occur until the 1880s. n174 The first genuine Jim Crow law requiring segregation of all railroad facilities was passed by Florida in 1887, followed by Mississippi in 1888 and Texas in 1889. n175 The Louisiana statute upheld in Plessy was passed in 1890. n176 In Plessy, the Court spoke as if Jim Crow laws were part of the "established usages, customs and traditions of the people," n177 but in fact the laws were of very recent vintage.

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n173. See Foner, supra note 21, at 370.

n174. For detailed accounts of the emergence of Jim Crow laws in four Southern jurisdictions, see Glasrud, supra note 171; Linda M. Matthews, Keeping Down Jim Crow: The Railroads and the Separate Coach Bills in South Carolina, 73 S. Atl. Q. 117 (1974); Meier & Rudwick, supra note 170 (Savannah, Georgia); Stanley J. Folmsbee, Note, The Origin of the First "Jim Crow" Law, 15 J.S. Hist. 235 (1949) (Tennessee).

n175. Lofgren, supra note 9, at 22.

n176. Act of July 10, 1890, No. 111, 1890 La. Acts 152, 154 (quoted in Plessy, 163 U.S. at 540).

n177. 163 U.S. at 550.

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II. The Civil Rights Act of 1875

In contrast to the scant discussion of segregated education during debate over the Fourteenth Amendment, the Reconstruction Congresses during the period 1868-1875 were forced to confront the issue repeatedly. While the Thirty-ninth Congress concentrated on passing the Amendment - a context in which avoidance or obfuscation of controversial issues is often the best strategy - later Congresses were forced to determine what it meant, in the context of the most difficult questions of the day. The actions taken by Congress from 1868 through 1875 to enforce the Fourteenth Amendment and the congressional deliberations over those measures thus present the best available evidence of the original understanding of the meaning of the Amendment as it bears on the issue of school segregation. Although this evidence might be inferior in principle to information directly bearing on the opinions and expectations of the framers

and ratifiers during deliberations over the Amendment itself, there is no significant body of evidence concerning the latter. The relatively modest evidence that does exist is overwhelmed by the abundance of evidence from the enforcement period.

The principal focus of this Article is therefore on the effort from 1870 through 1875, led by Charles Sumner in the Senate and General Benjamin F. Butler in the House, to enact legislation pursuant [*985] to the Fourteenth Amendment to abolish de jure segregation in public schools. The ultimate result of their efforts was the enactment of the Civil Rights Act of 1875, n178 which forbade racial discrimination in inns, theaters, common carriers, and other forms of public accommodation. Although this legislation, together with the Civil Rights Act of 1866, n179 was the centerpiece of enforcement of the Fourteenth Amendment, its constitutional underpinnings and legal substance have received little attention, perhaps because the Act was struck down by the Supreme Court only eight years after enactment, in the Civil Rights Cases. n180 Because of this decision, scholarly analysis of the 1875 Act has been directed almost exclusively to the problem of "state action" under the Amendment, which was the focal point of the Civil Rights Cases, to the neglect of the equally important implications for the questions of segregation and the scope of the civil rights protected by the Amendment. Moreover, because the legislation ultimately adopted in 1875 did not apply to schools and made no overt reference to segregation, there has been little recognition of the relevance of this legislation to the issue later faced in Brown. But in fact, the most important and controversial question raised by the legislation was the constitutionality of de jure segregation of the public schools. This topic dominated debate in Congress for a three and a half year period.

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n178. 18 Stat. 335 (1875).

n179. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

n180. 109 U.S. 3 (1883).

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It is during this debate over what ultimately became the Civil Rights Act of 1875 that constitutional theories of the day regarding school segregation were most fully developed. The school desegregation effort was ultimately unsuccessful, but the degree of support it commanded belies the standard account, according to which it is "fanciful" to suppose that the generation that enacted the Fourteenth Amendment understood it to forbid segregated schools. In a series of votes in different procedural contexts, opponents of school segregation were able to muster significant support - often large majorities - in both houses of Congress. Perhaps more importantly, Congress eventually did pass legislation requiring desegregation of common carriers and places of public accommo [*986] dation, and expressly refused to enact an amendment that would sanction separate but equal schools.

Although the case for Brown would be stronger if school desegregation legislation had actually passed, it is extremely significant that half or more of the Congress voted repeatedly to abolish segregated schools under authority of the Fourteenth Amendment. This is especially true given that the opponents

of these measures could not agree on any particular constitutional theory under which segregation could be defended as lawful, and many of them were acting out of evident hostility or indifference to the goals of the Fourteenth Amendment.

It may be helpful to understanding the following account to have reference to a chronology of the relevant events:

[tdm'0000',ql,s1m[tcg2m,mp1,ql,vu1,s1m][tu3;2][tn1,2]
CHRONOLOGYOFEVENTS1866Congress enacts Civil Rights Act of 1866 (property, contract, capacity to sue, etc.) - now 42 U.S.C. 1981 Fourteenth Amendment proposed by Congress 1868Fourteenth Amendment ratified 18701866 Act reenacted Sumner introduces desegregation bill 1872Debates on Sumner's bill as rider to amnesty bill Introduction and debate on House desegregation bill 1873Slaughter-House CasesRailroad Co. v. Brown1874Sumner dies Desegregation bill revised to reflect reliance on Equal Protection Clause Revised bill passes the Senate, but floor vote is forestalled in the House Congressional elections; Democratic landslide 1875Lameduck House deletes schools provision; rejects separate-but-equal alternative House passes Civil Rights Act of 1875 Senate passes Civil Rights Act as amended President Grant signs act into law Democrats assume control of both Houses of Congress 1876Disputed presidential election between Hayes and Tilden 1877Compromise of 1877 recognizes Hayes as President and brings Reconstruction to an end 1883Civil Rights Act of 1875 struck down in Civil Rights Cases1884Congress fails to prohibit segregation in Interstate Commerce Act 1887First Jim Crow law passed in Florida, requiring segregation in railway transportation 1896Plessy v. Ferguson[tu3;2] [*987]

A. Sumner's Bill

In 1870, Charles Sumner inaugurated the first attempt, pursuant to the Fourteenth Amendment, to outlaw school segregation in common schools, public accommodations, common carriers, and other institutions throughout the United States. In introducing the bill, Sumner declared: "I will say that when this bill shall become a law, as I hope it will very soon, I know nothing further to be done in the way of legislation for the security of equal rights in this Republic." n181 The effort was to outlive the Massachusetts Republican. It would pass both houses of Congress only after his death, and then only after it had been stripped of its most controversial features, including the schools provision. Sumner was both the best and the worst champion a cause could have. He was single-minded and persistent, self-righteous and overbearing to his allies and insufferable to his enemies. He was not well liked. But no one can question his sincere and lifelong commitment to achievement of the equality of rights for all Americans that he considered to be the unfulfilled promise of the Declaration of Independence. Even on his deathbed, he told his friend, Representative E.R. Hoar, "You must take care of the civil-rights bill, - my bill, the civil-rights bill, don't let it fail." n182

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n181. Cong. Globe, 41st Cong., 2d Sess. 3434 (May 13, 1870).

n182. David Donald, Charles Sumner and the Rights of Man 586 (1970).

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There is no doubt that Sumner's bill required desegregation, and not merely equality of resources. The language of the bill forbade "distinction of race, color, or previous condition of servitude" and guaranteed "the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege" furnished by the covered institutions. n183 The term "any" was understood to preclude exclu [*988] sion of black citizens from any accommodation or facility - even if another facility of comparable quality was provided. Similar language had been used by Congress to forbid segregation of railroads operating in the District of Columbia, and was so interpreted by the Supreme Court. n184 Moreover, if the language of the bill left any doubt, the debate quickly cleared it up. Senator Joshua Hill, a Republican from Georgia, rose to declare that he did not "hold that if you have public schools, and you give all the advantages of education to one class as you do to another, but keep them separate and apart, there is any denial of a civil right in that." n185 He made the same point with respect to hotels, dining rooms, railways, and churches. Sumner responded that Hill's speech was "a vindication on this floor of inequality as a principle, as a political rule," and that segregation imposed an inequality on both races. n186 The following exchange ensued:

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n183. Cong. Globe, 42d Cong., 2d Sess. 244 (1872) (read on Dec. 20, 1871) (emphasis added). The first section of the bill provided in full:

That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers; by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law; by trustees or officers of church organizations, cemetery associations, and benevolent institutions incorporated by national or State authority; and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude.

Id. The fourth section of the bill prohibited both state and federal courts from excluding jurors on the basis of race. Remaining sections of the bill dealt with penalties, enforcement, and preemption of inconsistent national and state law. Id.

n184. Railway Co. v. Brown, 84 U.S. (17 Wall.) 445 (1873). See infra notes 792-805 and accompanying text.

n185. Cong. Globe, 42d Cong., 2d Sess. 241 (1872) (statement of Sen. Hill on Dec. 20, 1871).

n186. Id. at 242.

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Mr. SUMNER.... The Senator mistakes substitutes for equality. Equality is where all are alike. A substitute can never take the place of equality. It is impossible; it is absurd. And still further, I must remind the Senator that it is very unjust; it is terribly unjust. Why, sir, we have had in this Chamber a colored Senator from Mississippi; but according to the rule of the Senator from Georgia we should have set him apart by himself; he should not have sat with his brother Senators. Do I understand the Senator from Georgia as favoring such a rule?

Mr. HILL. No, sir.

Mr. SUMNER. The Senator does not.

Mr. HILL. I do not, sir, for this reason: it is under the institutions of the country that he becomes entitled by law to his seat here; we have no right to deny it to him. [*989]

Mr. SUMNER. Very well; and I intend to the best of my ability to see that under the institutions of his country he is equal everywhere. n187

Upon Hill's further argument that proximity of black to white, or white to black, in hotels or railroads, does not affect their "comfort or security" - an unambiguous defense of "separate-but-equal" - Sumner hotly responded: "The Senator does not seem to see that any rule excluding a man on account of his color is an indignity, an insult, and a wrong; and he makes himself on this floor the representative of indignity, of insult, and of wrong to the colored race." n188 Further debate contained similarly unambiguous statements, from supporters and opponents alike, indicating that the bill was clearly understood as prohibiting segregation. n189 Senator Thurman said of a later version of the bill: "I do not think there is one member of the majority of the Judiciary Committee who will not say, if the question is put directly to him, that the meaning of the section is that there shall be mixed schools." n190

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n187. Id.

n188. Id.

n189. E.g., id. at 3256-58 (May 9, 1872) (speech by Sen. Ferry defending separate schools and opposing a requirement of "mixed schools"); id. at app. 42 (Feb. 8, 1872) (statement by Sen. Vickers) ("The friends of this measure are unwilling that separate schools for the races shall be provided ...."); id. at app. 26-27 (Feb. 6, 1872) (statement by Sen. Thurman criticizing the bill on the ground that separation of the races is not unequal); id. at app. 27 (Feb. 6, 1872) (statement by Sen. Trumbull describing the bill as forcing poor white and colored children into the same schools); id. at 384 (Jan. 15, 1872) (statement by Sen. Sumner) ("It is easy to see that the separate school founded on an odious discrimination and sometimes offered as an equivalent for the common school, is an ill-disguised violation of the principle of Equality, while as a pretended equivalent it is an utter failure.").

n190. 2 Cong. Rec. 4088 (May 20, 1874). Thurman's statement was not quite accurate, for many supporters of the bill distinguished between "mixed schools" (meaning mandatory integration) and desegregation. See infra notes 626-40 and accompanying text. As an opponent of the measure, Thurman was inclined to blur the distinction.

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In all the debates, the only statement by a supporter of Sumner's bill that appears to countenance segregated schools is a speech by Senator John Sherman of Ohio. n191 On May 8, 1872, he endorsed the result in State ex rel. Garnes v. McCann, n192 the decision of the Ohio Supreme Court discussed in the previous Section, which upheld separate but equal schools under the Fourteenth Amendment. This statement is difficult to square with Sherman's consis [*990] tent opposition to attempts to substitute a separate-but-equal provision in the bill. It is possible that Sherman did not accurately understand the court's holding, since the decision had come down the preceding day and he was presumably relying on newspaper accounts. His summary of the Garnes decision was ambiguous; he explained that the State "does in certain cases provide for separate schools," n193 which could refer to either a freedom of choice plan or a system of de jure segregation. The full opinion in Garnes makes clear that de jure segregation was in fact the issue, but Sherman may not have known that. In any event, the incident passed without further comment, and is buried by the numerous statements of both supporters and opponents that the bill outlawed segregated schools.

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n191. Cong. Globe, 42d Cong., 2d Sess. 3193 (May 8, 1872).

n192. 21 Ohio St. 198 (1872); see supra notes 113-17 and accompanying text.

n193. Cong. Globe, 42d Cong., 2d Sess. 3193 (May 8, 1872).

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B. The Proponents' Constitutional Theory

The debate over Sumner's proposal was a mixture of constitutional arguments and arguments regarding policy and expedience - with doses of overt racism and obstructionism thrown in by some of the opponents. Proponents maintained that the bill was an appropriate means of enforcing the provisions of the new Amendment; n194 opponents maintained that it was not. n195 It was impossible [*991] to support the bill without at least implicitly taking the position that segregation was a denial of the equality of rights mandated by the Amendment. The only plausible source of congressional authority to interfere with such matters of state law as inns, theaters, schools, and intrastate transportation was the power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article." n196 At that time no one would have conceived of the commerce power as a source of authority to pass legislation governing the domestic practices of the states, n197 and there were no federal appropriations to provide a basis for

regulation under the spending power. n198 In order to vote for a bill outlawing segregation, a congressman thus had to conclude that segregation was in violation of the Amendment; otherwise the bill would not be an "appropriate" enforcement measure. As the principal sponsor and Chairman of the Judiciary Committee in the House commented, supporters of the bill "have all come to a conclusion on this subject ... that these are rights guaranteed by the Constitution to every citizen, and that every citizen of the United States should have the means by which to enforce them." n199

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n194. For instance, Representative Walls explained his support for the bill on the ground that:

[if] there is a denial, tacit or direct, to any person in any State of the equal protection of all law[,] ... then the spirit of the provisions of the fourteenth article of amendment to the Federal Constitution is violated, and there is need for the appropriate legislation for the enforcement of the same as provided for in section 5 of said article.

2 Cong. Rec. 416 (Jan. 6, 1874).

n195. See, e.g., Cong. Globe, 42d Cong., 2d Sess. at 3733 (May 21, 1872) (statement by Senator Casserly that he was against the bill because it was "grossly and wantonly unconstitutional"); id. at 3257 (May 9, 1872) (statement by Sen. Ferry) ("It has been the assertion of those who support this bill with regard to the schools that compelling the separation of the races into different buildings was a violation of the fourteenth amendment . ..."); id. at 3261 (statement of Sen. Bayard) ("Under this Government of ours, where is the power delegated to Congress to perform these acts? There is none expressed; there is none justly to be implied."); id. (argument of Sen. Casserly that desegregated education is not a privilege and immunity under the Fourteenth Amendment); id. at app. 41-42 (Feb. 8, 1872) (argument by Sen. Vickers that school desegregation does not violate the privileges and immunities clause, which he understood to be the basis for the legislative proposal).

n196. U.S. Const. amend. XIV, 5.

n197. The commerce power, Art. I, 8, was the source of authority to pass Title II of the Civil Rights Act of 1964. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). The only reference to the commerce power during the course of the debates was Sen. Carpenter's final speech on the bill in 1875, in which he opined that the provision of the bill involving "public conveyance on land or water ... might be sustained as a regulation of commerce if confined to that commerce over which Congress possesses the power of regulation ...." 3 Cong. Rec. 1861 (Feb. 27, 1875); see also id. at 1862 (distinguishing interstate commerce over which Congress has power to regulate from intrastate commerce over which it does not). He went so far as to suggest that theaters might be covered with respect to persons traveling in interstate commerce, though he admitted that such a construction of the commerce power was "somewhat fantastic." Id. at 1861.

n198. The spending power, Art. I, 8, was the source of authority to pass Title VI of the Civil Rights Act of 1964. See Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 598 (1982) (White, J., plurality op.).

n199. 2 Cong. Rec. 457 (Jan. 7, 1874) (statement of Rep. Butler).

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Supporters of the measure readily admitted that if the states retained the authority to maintain segregated schools under the Fourteenth Amendment, "we cannot interfere with it" by legislation. n200 Indeed, supporters frequently averred not only that the bill was within the power of Congress, but that Congress had the con [*992] stitutional responsibility to pass such a bill. Senator Pratt of Indiana was typical in declaring that he had

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n200. Id. at 4173 (May 22, 1874) (statement of Sen. Edmunds).

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[a] duty, as a member of this body, sworn to support this Constitution in all its parts, a plain one, to aid by my voice and vote in doing whatever is necessary to enforce and carry into effect this article [the Fourteenth Amendment] wherever I find a single right or privilege of citizenship withheld from the colored man. n201

A vote for the bill, therefore, was tantamount to an interpretation of the Amendment as barring segregation of the covered facilities. A vote against the bill was - with a few exceptions noted below - equally an affirmation of the opposite interpretation. n202

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n201. Id. at 4081 (May 20, 1874). For a similar statement, see 3 Cong. Rec. 980 (Feb. 4, 1875) (statement of Rep. Hale).

n202. See infra notes 767-91 and accompanying text.

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1. Equal Rights, Common Carriers, and Common Schools

The affirmative case for desegregation of the schools was, to its proponents, quite simple. To them, the Fourteenth Amendment stood for the proposition that all citizens are entitled to the same civil rights, regardless of their race, color, nationality, social standing, or previous condition of servitude. This did not mean that citizens were entitled to equality with respect to everything; supporters and opponents of the bill alike had definite views about the limited nature of "civil rights," which did not encompass all privileges or benefits. The dominant understanding has been labeled the theory of "limited absolute equality" - equality that is limited to certain spheres ("civil rights") but is absolute within those spheres. n203 Senator George Edmunds explained that the civil rights bill

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n203. For an excellent discussion of this theory, see Maltz, supra note 13, at 68, 157-58; Earl M. Maltz, Reconstruction Without Revolution: Republican Civil Rights Theory In the Era of the Fourteenth Amendment, 24 Houston L. Rev. 221 (1987) [hereinafter Maltz, Reconstruction Without Revolution].

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proceeds upon the idea that the Constitution does secure to the citizen certain inherent rights, because they are rights, and then it merely undertakes to enforce those rights, not to enter into a parley with the States about them and say "you may or may not [*993] enforce them as you may think is desirable," or say "you may enforce them in this way or that way." n204

A particular subject, such as common school education, "is either an absolute right that the Constitution gives to the citizens, or it is nothing at all and does not touch the case." n205

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n204. 2 Cong. Rec. 4172-73 (May 22, 1874).

n205. Id. at 4172. See also Cong. Globe, 42d Cong., 2d Sess. 3253 (May 9, 1872) (statement of Sen. Wilson) (viewing "perfect and absolute equality" as a fundamental ideal of American institutions).

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This approach differs from standard Fourteenth Amendment doctrine today. At considerable risk of oversimplification, it can be said that the current law of equal protection is oriented not toward the rights of the individual but toward the decisionmaking processes of the government. It is designed to root out intentional discrimination across the entire range of state action. n206 To the supporters of the civil rights bills during the Reconstruction period, however, the focus was on an equality of rights, not on whether the processes of government were infected by discriminatory intent. The Fourteenth Amendment (first by virtue of the Privileges or Immunities Clause, later shifting to the Equal Protection Clause) meant that legally enforceable civil rights are the same for all citizens (or, after the shift to Equal Protection, all persons), without distinction on the basis of race, color, or previous condition of servitude. The practical test was to ask which rights a white citizen would be able to enforce, and to extend the same set of rights to all.

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n206. Washington v. Davis, 426 U.S. 229, 246-48 (1976). See David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935 (1989).

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The legal theory supporting the Act was set forth at length by Senator Sumner when he first proposed his civil rights rider, and was repeated by proponents throughout the debate. Sumner explained that the "inn is a public institution, with well-known rights and duties," among which is "the duty to receive all paying travelers decent in appearance and conduct." n207 He distinguished the inn from "a lodging-house or boarding-house, which is a private concern, and not subject to the obligations of the inn." n208 The coverage of the civil rights bill was not based on the distinction [*994] between the governmental and the private, but on whether the entities in question, public or private, had a general legal obligation to serve all comers. Sumner cited a variety of legal authorities, including Story's Commentaries on the Law of Bailments, Kent's Commentaries, Parsons' Contracts, the entry on "Inn" in Chamber's Encyclopedia, and the Chronicles of Holingshed, written in the reign of Queen Elizabeth. These authorities demonstrated that the common law provided a "peremptory rule opening the doors of inns to all travelers, without distinction, to the extent of authorizing not only an action but an indictment for the refusal to receive a traveler." n209 Thus, the civil rights bill "is only declaratory of existing law giving to it the sanction of Congress." n210 Sumner explained that this common law protection "ought to be sufficient," but that "it is set at naught by an odious discrimination," making it necessary for Congress to "interfere." He applied the same analysis, using similar citations, to public conveyances, theaters, and places of amusement. n211

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n207. Cong. Globe, 42d Cong., 2d Sess. 383 (Jan. 15, 1872).

n208. Id.

n209. Id.

n210. Id. For similar legal analyses, see 2 Cong. Rec. 412 (Jan. 6, 1874) (statement of Rep. Lawrence); Cong. Globe, 42d Cong., 2d Sess. 3264 (May 9, 1872) (statement of Sen. Edmunds); id. at 3192 (May 8, 1872) (statement of Sen. Sherman); id. at 843-44 (Feb. 6, 1872) (statement of Sen. Sherman).

n211. See Cong. Globe, 42d Cong., 2d Sess. 383 (Jan. 15, 1872) (statement of Sen. Sumner) ("Public conveyances, whether on land or water, are known to the law as common carriers, and they, too, have obligations not unlike those of inns."); id. ("Theaters and other places of public amusement ... are public institutions, regulated if not created by law, enjoying privileges, and in consideration thereof, assuming duties not unlike those of the inn and the public conveyance.").

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Thus, in the view of its supporters, the civil rights bill did not create any new rights or obligations. According to William Lawrence of Ohio, one of the most careful lawyers among the Republican proponents, the bill "simply declares that wherever public rights already exist by law in favor of citizens generally, none shall be excluded merely on account of race or color." n212 Most of these rights derived from the common law. n213 The Civil Rights Act of 1866 protected the common law rights of contract, property, and security of the person. The Civil Rights Act of 1875 protected the common law rights of access to public inns and accommodations, [*995] amusements, common carriers, and the like.

To its supporters, the constitutional basis for the two Acts was the same. n214

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n212. 2 Cong. Rec. 412 (Jan. 6, 1874); accord id. at 410 (statement of Rep. Elliott).

n213. See Cong. Globe, 42d Cong., 2d Sess. 844 (Feb. 6, 1872) (statement of Sen. Sherman).

n214. Id. at 383 (Jan.15, 1872) (statement of Sen. Sumner) ("The bill for Equal Rights is simply supplementary to the existing Civil Rights Law, which is one of our great statutes of peace, and it stands on the same requirements of the Constitution."); accord id. at 3191-92 (May 8, 1872) (statement of Sen. Sherman).

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Enforcement was the issue. Advocates of the civil rights bill maintained that the right to equality of treatment in the covered facilities already existed in the law, but that racial prejudice rendered actual enforcement defective. As Senator Sherman explained, "we know as a matter of fact that in many States, in many communities, a man cannot, on account of his color, exercise these rights; and this [bill] merely supplements and gives him an additional remedy." n215 Alonzo Ransier, a black Representative from South Carolina, more pointedly asserted: "the States will not give us protection in these matters, and well do these "State-rights' men know this." n216 A letter from a black citizen of Arkansas, read into the record, reported that the state legislature had enacted "good, if not entirely sufficient" laws securing equal rights in steamboats, railroads and public thoroughfares generally, but that "those charged under oath to see the laws faithfully executed look on with seeming heartless indifference, while the law remains a dead letter on the statute-book." n217 Lawrence said that the "bill is necessary because the common law has been changed by local statutes" making protections unavailable to blacks. n218 The purpose of the bill, then, was to provide federal enforcement to ensure that [*996] black citizens would not be denied the rights white citizens already had to nondiscriminatory treatment by common carriers and other institutions with a preexisting legal obligation to serve all comers without discrimination.

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n215. Cong. Globe, 42d Cong., 2d Sess. 3192 (May 8, 1872). Sherman also pointed out that the enforcement by black citizens of their rights was impeded by "local laws still alleged to be in force." Id. Senator Pratt later repeated this point:

But it is asked, if the law be as you lay it down, where the necessity for this legislation, since the courts are open to all? My answer is, that the remedy is inadequate and too expensive, and involves too much loss of time and patience to pursue it.... This bill is justified in providing a more efficient remedy, one that is so stringent in its penalties that it is likely to be obeyed, and render litigation unnecessary.

2 Cong. Rec. 4082 (May 20, 1874)

n216. 2 Cong. Rec. 383 (Jan. 5, 1874). See also 3 Cong. Rec. 940 (Feb. 3, 1875) (statement of Rep. Butler) ("We put in this penalty because there are portions of the country where there is not any law which can be enforced in favor of a colored man.").

n217. Letter from E.A. Fulton to Sen. Charles Sumner (Jan. 30, 1872), quoted in Cong. Globe, 42d Cong., 2d Sess. 726-27 (Jan. 31, 1872).

n218. 3 Cong. Rec. 940 (Feb. 3, 1875).

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Common school education, according to Sumner, presented an easier and yet a more important case. It falls "into the same category" as public inns, conveyances, and places of amusement, because "like the others, it must be open to all or its designation is a misnomer and a mockery." n219 Indeed, the "common school has a higher character," both because of the importance of its function and because "it is sustained by taxation to which all contribute." n220 Senator Matthew H. Carpenter of Wisconsin, who questioned extension of the bill to "voluntary institutions, whether incorporated or not, which we ought not to interfere with," had "no doubt of the power of this Government under the fourteenth amendment ... to say that a colored man shall have his right in the common school." n221 Schools, he insisted, are among the institutions that "are supported by law and maintained by general taxation," and thus required to extend their benefits to all. Although not a member of the Thirty-ninth Congress, Carpenter had probably studied the Fourteenth Amendment more intensively than any other member of the Reconstruction Congress, since he represented litigants in the first two Fourteenth Amendment cases to reach the Supreme Court. n222 His formulation came close to the modern public-private distinction. Senator Sherman expressed the point as follows:

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n219. Cong. Globe, 42d Cong., 2d Sess. 383-84 (Jan. 15, 1872).

n220. Id. at 384.

n221. Id. at 763 (Feb. 1, 1872).

n222. Carpenter represented the monopoly butchers in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 57 (1873), and a woman denied admission to the practice of law on the basis of her gender in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 133 (1873).

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It is the privilege of every person born in this country, of every inhabitant of the country whether born here or not, of a certain age, to attend our public schools which by law are set aside for the public benefit. Boys and girls go to the schools. It is the privilege of all, and declared to be so. All contribute to the taxes for their support; all are benefited by the education given to the rising generation; and therefore all are entitled to equal privileges in the public schools. n223

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n223. Cong. Globe, 42d Cong., 2d Sess. at 844 (Feb 6, 1872).

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Proponents of the bill had no difficulty declaring that racial segregation was a plain effort "to defeat equal rights" to which all citizens are entitled under the Fourteenth Amendment. n224 They professed to consider the point obvious and "self-evident." n225 In his first major introductory speech, Sumner stated that "it is easy to see that the separate school founded on an odious discrimination and sometimes offered as an equivalent for the common school, is an ill-disguised violation of the principle of Equality." n226 He recounted an "incident occurring in Washington, but which must repeat itself where ever separation is attempted," where black children living near the public school were "driven from its doors, and compelled to walk a considerable distance ... to attend the separate school." Not only was this "super-added pedestrianism and its attendant discomfort" a "measure of inequality in one of its forms," but more importantly, "the indignity offered to the colored child is worse than any compulsory exposure, and here not only the child suffers, but the race to which he belongs is blasted and the whole community is hardened in wrong.... This is plain oppression," Sumner declaimed, "which you, sir, would feel keenly were it directed against you or your child." n227

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n224. See id. at 3264 (May 9, 1872) (statement of Sen. Sumner).

n225. See 2 Cong. Rec. 4147 (May 22, 1874)

n226. Cong. Globe, 42d Cong., 2d Sess. 384 (Jan. 15, 1872).

n227. Id.

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2. Basis in Constitutional Text

While clear about the legal theory for the bill, Sumner appeared unconcerned about the precise textual source of constitutional authority for it. He stated that he found constitutional authority for the bill "not in one place or in two places or three places, but I find it almost everywhere, from the preamble to the last line of the last amendment." n228 At various times he invoked the Declaration of Independence and the Thirteenth Amendment, as well as the Fourteenth. n229 Sumner's arguments based on the Declaration were not well-received, even by his supporters. n230 Other advocates of [*998] the measure, fortunately, were more precise. In a lengthy speech, Carpenter located the source of the power in the Privileges or Immunities clause, augmented by

Section 5. n231 This was the most obvious and natural source of authority, for this was the clause that extended fundamental private rights to all citizens, without regard to race, color or other irrelevant characteristics. Senator John Sherman of Ohio, who had been a leading supporter of the Fourteenth Amendment, provided a similar constitutional analysis, likewise relying on Congress's power to enforce the Privileges or Immunities clause. n232 In the House, the bill's sponsor, General Benjamin Butler of Massachusetts, also relied on Privileges or Immunities. n233 Senator Oliver Morton of Indiana relied instead on Equal Protection, n234 as did Senator George Edmunds of Vermont, another prominent supporter of the Amendment. n235

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n228. Id. at 727 (Jan. 31, 1872).

n229. Id. at 728.

n230. See Id. at 760-61 (Feb. 1, 1872) (statement of Sen. Carpenter); id. at 730 (Jan. 31, 1872) (statement of Sen. Lot Morrill); id. at app. 1 (Jan. 25, 1872) (statement of Sen. Lot Morrill).

n231. Id. at 761-63 (Feb. 1, 1872); see also id. at 763-64 (statement by Sen. Davis) (interpreting Carpenter's position as relying on the Privileges and Immunities Clause).

n232. Id. at 843-44 (Feb. 6, 1872). For a detailed analysis of the Privileges or Immunities Clause, see Harrison, supra note 9.

n233. 2 Cong. Rec. 340 (1874) (statement of Rep. Butler on Dec. 19, 1873).

n234. Cong. Globe, 42d Cong., 2d Sess. 847 (Feb. 6, 1872).

n235. Cong. Globe, 42d Cong., 2d Sess. app. 26 (Feb. 6, 1872).

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The constitutional argument took an abrupt and surprising turn in 1873, when the Supreme Court handed down its first decision interpreting the Fourteenth Amendment, in the Slaughter-House Cases. n236 The decision involved a controversy seemingly far removed from the concerns of the framers of the Amendment or of the antagonists in the struggle over the civil rights bill. The State of Louisiana had passed an ordinance granting a monopoly over the business of meat butchery in New Orleans and surrounding parishes to a single firm, the Crescent City Live-Stock Landing and Slaughter-House Company. The excluded butchers of the City challenged the ordinance on the ground that it reserved the right to engage in a common trade or business, which is a privilege or immunity of citizens, to a particular class of persons, in violation of the equality of rights protected under the Fourteenth Amendment. The Supreme Court rejected that argument. In so doing, it adopted an extraordinarily narrow reading of the Privileges or Immunities Clause, which had been understood to be the central and most important substantive provision of the Amendment. In [*999] essence, the Court held that the Privileges or Immunities Clause protected only against infringements of rights of United States citizens and not rights that derive from state law. As a result, such rights as habeas corpus, interstate travel, and the care and protection of the federal government while on the high seas

or abroad would be protected, n237 but common law rights of tort, property, and personal security would not be. n238

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n236. 83 U.S. (16 Wall.) 36 (1873).

n237. Id. at 79-80.

n238. See Id. at 75-76.

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This interpretation is implausible for three nearly incontrovertible reasons. First, it makes the Privileges or Immunities Clause redundant: rights derived from federal law already are protected against hostile state legislation under the Supremacy Clause. n239 Second, it is inconsistent with the universal view that the Fourteenth Amendment encompassed (at least) the rights protected by the Civil Rights Act of 1866. The 1866 Act protected black citizens in their enjoyment of numerous rights derived from state law, including the right to make and enforce contracts, to acquire, hold, and dispose of property, and to testify in court. n240 If Slaughter-House is correct, then these rights were not privileges or immunities of citizens - a position impossible to square with the legislative history of the Amendment. Third, the Slaughter-House decision means that the Privileges or Immunities Clause of the Fourteenth Amendment protects a different set of rights than the Privileges and Immunities Clause of Article Four, which is both textually improbable and contrary to extensive legislative history. n241 The better view is that the Privileges or Immunities Clause of the Fourteenth Amendment protected citizens against denials by their own [*1000] states of the same set of rights that the Privileges and Immunities Clause of Article Four protected against infringement by other states, and possibly, in addition, other rights of United States citizenship. On this reading of the Privileges and Immunities Clause, the rights that once were guaranteed to out-of-staters were now guaranteed to all citizens. n242

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n239. See Harrison, supra note 9, at 1415. This point was effectively made by Justice Field in his Slaughter-House dissent. 83 U.S. at 96 (Field, J., dissenting). Interestingly, the point was admitted by prominent Democratic opponents of the Act. See 2 Cong. Rec. app. 312 (May 22, 1874) (statement of Sen. Merrimon) ("That provision [referring to the Privileges or Immunities Clause] is merely surplusage; if there was a citizenship of the United States before the adoption of this amendment to the Constitution, the States could not abridge the rights of a citizen of the United States before its adoption.").

n240. See Harrison, supra note 9, at 1416.

n241. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 1835-37 (Apr. 7, 1866) (statement of Rep. Lawrence, citing antebellum interpretations of the Privileges and Immunities Clause of Article IV in explaining the content of the Privileges or Immunities Clause of the Fourteenth Amendment); id. at 474-75 (Jan. 29, 1866) (statement of Sen. Trumbull to similar effect).

n242. See Harrison, supra note 9, at 1418-19, 1452. For an example of this point in the debates over the Sumner rider prior to the Slaughter-House decision, Senator Carpenter stated:

"Privileges and immunities" were then what they are now. Privileges and immunities are protected differently now from what they were then .... Now these same privileges and immunities are protected in a different way, but they are the same. The same things which were then at the mercy of the States in a certain particular, are now secured and guarantied by the fourteenth amendment.

Cong. Globe, 42d Cong., 2d Sess. 762 (Feb. 1, 1872).

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Democratic opponents of the bill immediately seized on the Slaughter-House decision and quoted it over and over. The rights protected by the proposed civil rights bill all were derived from state law, mostly state common law. It followed, these opponents said, that Congress had no authority under the Fourteenth Amendment to legislate with respect to these rights. Congressman Roger Mills of Texas put the point in these words:

From the authority of adjudged cases it is clear that the privileges and immunities mentioned in the fourteenth amendment are only such as are conferred by the Constitution itself as the supreme law over all ....

....

... Whatever rights the State confers are subject to its own sovereign pleasure. Whether it shall grant them, how grant them, and what discriminations it shall make in granting them, are questions left entirely to its own discretion. n243

Senator Norwood stated:

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n243. 2 Cong. Rec. 384-85 (Jan. 5, 1874). Similar speeches were made by Representatives Bright, id. at 414-15 (Jan. 6, 1874); Herndon, id. at 419; Durham, id. at 405-06; Harris, id. at 376 (Jan. 5, 1874); and Stephens, id. at 379-80; Beck, id. at 342-43 (1874) (speaking on Dec. 19, 1873).

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no one, lawyer or layman, will deny that every privilege named in this bill before the adoption of the fourteenth amendment, was derived by those who enjoyed them exclusively from the States of which they were citizens. To keep a public inn; to bury the dead; to construct and manage railroads and other modes of conveyance; to [*1001] open and manage a theater, are privileges conferred by each State. n244

It followed, under the logic of Slaughter-House, that Sumner's bill overstepped federal authority.

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n244. Id. at app. 240 (Apr. 30, and May 4, 1874).

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The Slaughter-House decision changed the tenor of the debate and forced the Republicans to clarify or revise the textual basis for their constitutional position. Some Republicans simply insisted that the Slaughter-House decision "is not the law" and should not be followed by the Congress. n245 Senator Howe predicted that the Slaughter-House opinion would never "be accepted by the profession or the people of the United States." n246 So unnatural was the Slaughter-House reasoning that most members of Congress continued to speak in terms of privileges and immunities except when explicitly discussing the decision itself. Others interpreted Slaughter-House as standing for the proposition that the Fourteenth Amendment prohibits "distinctions and discriminations ... made on account of race, color, or previous condition of servitude," but has no application when distinctions are "made upon any other ground." n247 The main Republican response, however, was to shift the weight of their position from the Privileges or Immunities Clause to the Equal Protection Clause.

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n245. See 3 Cong. Rec. 1792 (Feb. 26, 1875) (statement of Sen. Boutwell) (stating, in terms reminiscent of Lincoln's remarks on Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), that the Slaughter-House decision "is the law of the case, but it is not law beyond the case; it is not law with reference to the rights of the States generally, and certainly is not law for the Senate"). Senator Alcorn stated:

This is one branch of this Government, the legislative department; the judiciary is another branch; and we go forward without regard to the opinions of each other unless those opinion have taken the form of judicial decision rendered in answer to the demands of a case properly brought before the court.

2 Cong. Rec. app. 304 (May 22, 1874).

n246. 2 Cong. Rec. 4148 (May 22, 1874). He was, of course, mistaken in a literal sense, as the Privileges or Immunities Clause has essentially been read out of existence; but the substance of his prediction has been fulfilled circuitously by the expansive interpretation now afforded to the Equal Protection Clause.

n247. See, e.g., 3 Cong. Rec. 943 (Feb. 3, 1875) (statement of Rep. Lynch).

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The relation between the Equal Protection and Privileges or Immunities Clauses is an unsettled question, to which little scholarly or judicial attention has been paid. n248 This is what we can say [*1002] with confidence: the Privileges or Immunities Clause by its terms applies only to

United States citizens, while the Equal Protection Clause applies to "any person within [a state's] jurisdiction." n249 The Equal Protection Clause clearly applies to laws passed for the security of persons and property, n250 and perhaps to other laws for the benefit or protection of persons; n251 but it falls short of protecting the full range of privileges and immunities of citizens. n252 Thus, the Privileges or Immunities Clause applies to a smaller class of persons and a larger class of rights. n253 The only clear example we have of a right that was protected on behalf of citizens under the Privileges or Immunities Clause but not on behalf of noncitizens under the Equal Protection Clause was the right to own real property, n254 but in theory there must have been others.

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n248. Maltz, supra note 13, at 96-102, and Harrison, supra note 9, are the principal exceptions.

n249. U.S. Const. am. XIV, 1.

n250. See Harrison, supra note 9, at 1435-38; see also Steven J. Heyman, The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 41 Duke L.J. 507, 566-70 (1991) (defining the scope of the Equal Protection Clause, as originally understood, as encompassing civil protection, criminal protection, and prevention of injury).

n251. Harrison, supra note 9, at 1441; see Cong. Globe, 42d Cong., 2d Sess. 847 (Feb. 6, 1872) (statement of Sen. Morton) (Equal Protection "means not simply the protection of the person from violence, the protection of his property from destruction, but it is substantially in the sense of the equal benefit of the law"); accord 2 Cong. Rec. 412 (Jan. 6, 1874) (statement of Rep. Lawrence). As Harrison points out, this was distinctly a minority position before Slaughter-House, but was more commonly held after the decision. Harrison, supra note 9, at 1430. A good statement of the prevailing view prior to Slaughter-House was made by Senator Allen Thurman, Democrat from Ohio, at Cong. Globe, 42d Cong., 2d Sess. 496 (Jan. 22, 1872).

n252. Harrison, supra note 9, at 1449-51.

n253. See Maltz, supra note 13, at 102.

n254. This can be deduced from the fact that section 18 of the Enforcement Act of 1870, which reenacted the Civil Rights Act of 1866, applied only to citizens and included the rights of property, while section 16, which was new, applied to all persons and conspicuously did not include the rights of property. See Act of May 31, 1870, Ch. 114, 16, 18, 16 Stat. 140, 144. This distinction survives in current law. Compare 42 U.S.C. 1981 (1988) (applicable to all persons) with 42 U.S.C. 1982 (1988) (applicable only to citizens). For a more detailed discussion, see Harrison, supra note 9, at 1442-51; Earl M. Maltz, The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framers' Ideal of Equality, 7 Const. Comm. 251, 257-65 (1990).

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Republican supporters of the civil rights bill turned to the Equal Protection Clause as a solution to the Slaughter-House problem because that

Clause was not limited to rights of federal citizenship. In one of the most important speeches in the House debates, Robert Elliott of South Carolina reasoned as follows: [*1003]

There are privileges and immunities which belong to me as a citizen of the United States, and there are other privileges and immunities which belong to me as a citizen of my State.... But what of that? Are the rights which I now claim [summarizing the rights protected by the bill] rights which I hold as a citizen of the United States or of my State? Or, to state the question more exactly, is not the denial of such privileges to me a denial to me of the equal protection of the laws? For it is under this clause of the fourteenth amendment that we place the present bill, no State shall "deny to any person within its jurisdiction the equal protection of the laws." No matter, therefore, whether his rights are held under the United States or under his particular State, he is equally protected by this amendment. n255

William Lawrence, a former judge and a supporter of the Fourteenth Amendment in the Thirty-ninth Congress, delivered a lengthy and meticulous analysis of the constitutional issue, in which he argued that the word "protection" in the Equal Protection Clause "must not be understood in any restricted sense, but must include every benefit to be derived from laws." n256 This included the right "to an equal participation in the benefit to result from the law regulating common carriers." n257 He explained that "all these [civil rights] acts proceed upon the idea that if a State omits or neglects to secure the enforcement of equal rights, that it "denies' the equal protection of the laws within the meaning of the fourteenth amendment." n258 These speeches established the new constitutional theory of the bill.

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n255. 2 Cong. Rec. 409 (Jan. 6, 1874).

n256. Id. at 412.

n257. Id.

n258. Id. at 414; accord id. at 416 (statement of Rep. Walls) (conceding for sake of argument that the privileges or immunities of citizens were not presently being denied under state law but basing support for the bill on the denial of equal protection).

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Democrats did not bother to respond to the equal protection argument. They continued to make speeches quoting from Slaughter-House and insisting that the rights protected by the bill were not privileges or immunities of United States citizens. n259

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n259. See, e.g., id. at 741-42 (Jan. 17, 1874) (statement of Rep. Hamilton); id. at app. 1-3 (Jan. 7, 1874) (statement of Rep. Southard).

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It is evident that Equal Protection would not have emerged as the basis for the bill if not for Slaughter-House. The Republicans' [*1004] resourceful reliance on the Equal Protection Clause as the principal provision dealing with issues of racial discrimination persists to this day. The Privileges or Immunities Clause is a virtual dead letter, while the Equal Protection Clause has expanded to cover all the rights previously protected by the Privileges or Immunities Clause, and more. This is a remarkable inversion, since the Privileges or Immunities Clause was viewed by the framers as the principal provision, and the Equal Protection Clause received little attention. The most important practical effect of the doctrinal shift has been to obscure the distinction between rights pertinent to citizens and rights pertinent to noncitizens, which was significant to the framers of the Fourteenth Amendment (as is obvious on the face of the text), but is largely inconsequential to the constitutional law of today. n260

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n260. See, e.g., Sugarman v. Dougall, 413 U.S. 634, 642-43 (1973) (holding alienage to be a suspect basis of classification under the Equal Protection Clause). The holding of Sugarman is ironic, because the very text of the Fourteenth Amendment discriminates between "citizens" and other "persons." As a practical matter, the elevation of alienage to protected status creates serious difficulties only as applied to political rights, which, as has been noted, were not originally understood to be encompassed by the Fourteenth Amendment at all. Having collapsed the distinction between the privileges and immunities of citizens and the right of all persons to the equal protection of the laws, as well as the distinction between civil and political rights, the Supreme Court has been forced to recreate the distinction between citizens and persons for purposes of political rights cases under the Equal Protection Clause. See, e.g., Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (upholding a citizen/alien distinction where the restriction on aliens has a political, as opposed to economic, function). Thus, the original logical structure of the Amendment reemerges from the rubble of the Court's decisions.

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So far as the debates reveal, only one member of Congress changed his position as result of the Slaughter-House decision, but he was an influential convert: Senator Matthew Carpenter of Wisconsin. Carpenter is also the only member of Congress who spoke in favor of the policy and justice of the bill, n261 but against its constitutionality. n262 As already noted, prior to Slaughter-House, Carpenter had stated that he had "no doubt of the power of this Government under the fourteenth amendment" to pass the bill as applied to schools and other institutions "supported by law and maintained by general taxation." n263 After Slaughter-House, in [*1005] which he was the lawyer for the monopoly butchers, Carpenter became convinced "that all of the provisions of this bill are in conflict with the Constitution of the United States as expounded by the Supreme Court." n264 It is only natural for counsel to be persuaded by the opinion in a case that he won. But Carpenter found equal support for this conclusion in Bradwell v. Illinois, n265 which he had lost. Carpenter did not defend Slaughter-House or Bradwell on the merits. "It may be said that these decisions are incorrect," he acknowledged, but "still it must be admitted that the decisions exist, and that they prescribe for the judicial

department of the Government a rule which must be applied to this bill." n266 Carpenter predicted that, by force of Supreme Court precedent, "every circuit court in which a suit may be commenced" would find the bill unconstitutional. n267 He also predicted that "this bill, should it pass through all the forms of enactment, would be a dead letter." n268 Its only effect would be "to involve the colored man in litigation in which he is certain to be defeated." n269 In the end, the bill "would delay, not accelerate, the end desired." n270 This was to prove a more accurate prophecy than he had any just cause to expect.

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n261. See 3 Cong. Rec. 1861 (Feb. 27, 1875).

n262. Id. at 1861-63.

n263. Cong. Globe, 42d Con., 2d Sess. 763 (Feb. 1, 1872). From the beginning, Carpenter believed that the jury provisions of the bill were unconstitutional. See Cong. Globe, 42d Cong., 2d Sess. 827-28 (1872). His other constitutional objections, having to do with churches and private organizations, had been remedied by amendments to the bill. See infra notes 497-504 and accompanying text.

n264. 3 Cong. Rec. 1863 (Feb. 27, 1875).

n265. 83 U.S. (16 Wall.) 130 (1873).

n266. 3 Cong. Rec. 1863 (Feb. 27, 1875).

n267. Id.

n268. Id. at 1862.

n269. Id. at 1863.

n270. Id. at 1861.

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C. Constitutional Arguments of the Opposition, and the RepublicanResponse

Two principal constitutional theories dominated the arguments of the opposition. Some opponents conceded that the Fourteenth Amendment guaranteed all persons an equality of rights, including education, but denied that segregated education is unequal if facilities are otherwise comparable in quality or cost. That argument will be considered in Subsection 1. Others maintained that the Amendment gave Congress no authority to interfere with the administration of public schools, which are a state and local [*1006] responsibility. Education, according to this theory, is not a civil right. That argument will be considered in Subsection 2. It should be noted at the outset that the second argument is in tension with the first. If the Fourteenth Amendment does not have application to education, then there is no constitutional requirement that facilities must be "equal," or indeed, that black children be allowed to

attend school at all. In making the separate-but-equal argument, opponents of the bill implicitly (and often explicitly) disavowed the argument that education is not a civil right protected by the Amendment. The clearest example comes in this colloquy between Senators Morton and Merrimon:

Mr. MORTON. If I understand the scope of the Senator's question he now admits, in effect, ... that if the State law excludes the colored children from the schools entirely, that is a violation of the fourteenth amendment.

Mr. MERRIMON. I admit that with all its force. But the point I make is this, that it is competent for the State to make a distinction on account of race or color if it shall make the same provision for the black race that it makes for the white race.... n271

This tension in the opponents' arguments is significant because it shows that no one constitutional theory opposed to school desegregation commanded more than a fraction of a minority.

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n271. 2 Cong. Rec. app. 359 (May 21, 1874).

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1. Segregation Is Not Unequal

The legitimacy of separate but equal facilities was defended on three grounds: (a) the principle of formal (or "symmetrical") equality; (b) an interpretation of the social meaning of segregation; and (c) the distinction between civil rights and social rights.

a. Formal Equality

The formal equality argument was based on the proposition that laws permitting or requiring segregated facilities treat members of both races precisely alike. Blacks cannot attend white schools; whites cannot attend black schools; all persons are required to attend schools of their own race. The distinguishing character of the argument is that it is based on the formally symmetric treatment of the two races, without regard to the social context in which [*1007] the system operates. It was first articulated (in these debates) by Senator Joshua Hill of Georgia. Hill took issue with

the proposition that if there be a hotel for the entertainment of travelers, and two classes stop at it, and there is one dining room for one class and one for another, served alike in all respects, with the same accommodations, the same

attention to the guests, there is anything offensive or anything that denies the civil rights of one more than the other. n272

Racial segregation, Hill argued, preserves a perfect equality of legal rights for all persons, black as well as white. "I myself am subject in hotels and upon railroads to the regulations provided by the hotel proprietors for their guests, and by the railroad companies for their passengers." n273 Hill said he was "entitled, and so is the colored man, to all the security and comfort that either presents to the most favored guest or passenger," but proximity to a person of a different race "does not increase my comfort or security, nor does proximity to me on his part increase his; and therefore it is not a denial of any right in either case." n274

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n272. Cong. Globe, 42d Cong., 2d Sess. 241 (1872) (statement of Sen. Hill on Dec. 20, 1871).

n273. Id. at 242.

n274. Id.

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The argument for separate but equal schools was essentially identical to the argument for separate facilities in inns and transportation, but more intense. Blacks and whites could have "equal" schools, opponents of the bill said, without going to the "same" schools. n275 Senator Arthur Boreman of West Virginia stated that "it is just as much a violation of the right of a white child to keep him out of a black school as it is of a black child to keep him out of a white school." n276 Similarly, Representative John Atkins of Tennessee argued:

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n275. 2 Cong. Rec. 4144 (May 22, 1874) (statement of Sen. Stockton).

n276. Cong. Globe, 42d Cong., 2d Sess. 3195 (May 8, 1872); accord 2 Cong. Rec. app. 313, 315 (May 22, 1874) (statement of Sen. Merrimon). In a telling misstatement of the argument, Senator Francis Blair, an abolitionist Democrat from Missouri and former Union colonel, stated that the "white children can no more be compelled to enter schools in which black children are being taught than the blacks can enter those in which the whites are being taught, and the discrimination is as much against one as the other." Cong. Globe, 42d Cong., 2d Sess. 3251 (May 9, 1872). He seemed not to notice the difference between compulsion and permission.

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Are the States to be forced, in the education of the youth, to a procrustean rule which requires children of all colors and both sexes to be together[?] May not equal advantages be enjoyed by all, and yet keep the sexes and colors

apart? Would that not be a general law, and would it work any deprivation or hardship to any one? The social restriction would apply to the white child as well as to the black. n277

Senator Orris Ferry of Connecticut, who as a Northern Republican was one of the most important opponents of the school desegregation proposal, argued that "the same facilities, the same advantages, the same opportunities of education are given to the white child and the black child .... The only difference is that they do not receive those equal facilities and advantages in the same school-room ...." n278 Thus, the separate-but-equal argument was clearly presented, in terms not dissimilar to those at the time of Brown.

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n277. 2 Cong. Rec. 453 (May 8, 1874).

n278. Cong. Globe, 42d Cong., 2d Sess. 3190 (1872).

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Proponents countered that symmetrical restrictions on the two races do not constitute "equality." They said that "free government demands the abolition of all distinctions founded on color and race." n279 "You cannot get out by saying that there is an equality of right when you declare that you will put the black sheep in one place and the white sheep in another," Edmunds asserted. n280 As Sherman put the point: "The time has come when all distinctions that grew out of slavery ought to disappear ...; but, sir, as long as you have distinctions and discriminations between white and black in the enjoyment of legal rights and privileges[,] ... you will have discontent and parties divided between black and white." n281 Sumner characterized the proposal for "separate arrangements" for colored persons as "a substitute for equality." n282 [*1009] This he said was "clearly a contrivance, if not a trick, as if there could be any equivalent for equality." n283

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n279. 2 Cong. Rec. 4083 (May 20, 1874) (statement of Sen. Pratt); accord 3 Cong. Rec. 945 (Feb. 3, 1875) (statement of Rep. Lynch); id. at 958 (statement of Rep. Harris); 2 Cong. Rec. 3260 (May 9, 1874) (statement of Sen. Edmunds); Cong. Globe, 42d Cong., 2d Sess. 819 (Feb. 5, 1872) (statement of Sen. Wilson).

n280. Cong. Globe, 42d Cong., 2d Sess. 3190 (May 8, 1872).

n281. Id. at 3193.

n282. Id. at 382 (Jan. 15, 1872).

n283. Id.

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Supporters of the bill found no incongruity in the proposition that segregation discriminates against members of both races. Thus, in a colloquy with Hill, Sumner was asked, "On which race ... does the inequality to which the Senator refers operate?" n284 Sumner replied, "On both." n285 That the

discrimination was symmetrical did not make it any less discrimination.

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n284. Id. at 242 (1872) (statement of Sen. Hill on Dec. 20, 1871).

n285. Id.

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Although the term "color-blind," later made famous by the first Justice Harlan in his dissenting opinion in Plessy v. Ferguson, n286 was not uttered during the debate, proponents of the bill used synonymous formulations. Representative John Lynch stated that "the duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned." n287 Sumner quoted from Smith v. Gould, n288 that "the common law takes no notice of negroes being different from other men," which he then paraphrased as "[the law] makes no discrimination on account of color." n289 Sherman said that the way to restore peace in the South was to "wipe out all legal discriminations between white and black, ... make no distinction between black and white." n290 Representative Richard Cain, a black congressman from South Carolina, stated that "my understanding of human rights, of democracy if you please, is all rights to all men, ... without regard to sections, complexions, or anything else." n291

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n286. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

n287. 3 Cong. Rec. 945 (Feb. 3, 1875).

n288. 92 Eng. Rep. 338, 338 (1706).

n289. Cong. Globe, 42d Cong., 2d Sess. 385 (Jan. 15, 1872).

n290. Id. at 3193 (May 8, 1872).

n291. 3 Cong. Rec. 956 (Feb. 3, 1875).

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b. Social Meaning of Segregation

Opponents of the bill also offered arguments based on the social meaning of segregation, denying that, as a matter of practical reality, segregation was understood by blacks as a badge of inequality. In fact, supporters of segregation frequently stated, "the negro is as [*1010] much interested in keeping aloof from the white man as the white man is interested in keeping aloof from the negro." n292 They professed not to understand why blacks would interpret segregation as a brand of inferiority. "Have they no pride of race and of kindred?" Senator Cooper of Tennessee inquired. "Think you that it would trouble the Anglo-Saxon for any other race to turn him aside? Think you he

would care?" n293

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n292. 2 Cong. Rec. app. 316 (May 22, 1874) (statement of Sen. Merrimon); accord 2 Cong. Rec. 411 (Jan. 6, 1874) (statement of Rep. Blount); id. at 381 (Jan. 5, 1874) (statement of Rep. Stephens); Cong. Globe, 42d Cong., 2d Sess. 3259-60 (May 9, 1872) (statement of Sen. Hill); id. at 241 (1872) (statement of Sen. Hill on Dec. 20, 1871). This contradicted the opponents' other argument, that the Republicans were supporting the bill only for the purpose of currying favor with the 800,000 black voters in the South. See id. at 4083 (May 30, 1872) (statement of Sen. Thurman).

n293. 2 Cong. Rec. 4155 (May 22, 1874).

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There was some validity to the claim that a significant number of black Americans supported, or at least tolerated, segregated education, though the degree of black support was greatly exaggerated. n294 What the congressional spokesmen for segregation neglected to point out, however, is that a principal motivating factor in black support for segregated schools was the fear that their children would be insulted and mistreated in common schools. n295

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n294. See Gillette, supra note 18, at 201 (describing arguments within the black community); Kaestle, supra note 79, at 175-76 (same).

n295. Kaestle, supra note 79, at 173, 178; Gillette, supra note 18, at 201. Black parents were also very concerned about having black teachers for their children, which would not be likely in integrated schools. Kaestle, supra, at 176.

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Opponents of the bill frequently drew analogies to forms of separation that do not ordinarily carry a connotation of subordination or inferiority, such as the separation of young from old, or boys from girls. n296 In light of arguments a century later over whether the Fourteenth Amendment applies to gender discrimination, it is noteworthy that many members of Congress invoked the analogy of sex-segregated schools. Senator Thurman inquired, "Is not a female child a citizen? Is she not entitled to equal rights? Why, then, do you allow your school directors to provide a school for her separate from a school for the male?" n297 Senator Carpenter argued that if

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n296. See, e.g., 2 Cong. Rec. 4144 (May 22, 1874) (statement of Sen. Stockton); Cong. Globe, 42d Cong., 2d Sess. 3261 (May 9, 1872) (statement of Sen. Casserly).

n297. Cong. Globe, 42d Cong., 2d Sess. app. 26 (Feb. 6, 1872).

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these provisions of the fourteenth amendment require that colored persons should be eligible to serve as jurors in State courts ..., then this bill ought to be so amended as to provide that women and babes at the breast should be so eligible; because they are persons equally with colored citizens entitled under these two clauses of the amendment to everything secured to colored citizens. n298

Senator Merrimon noted that "there is no provision in the Constitution of the United States which protects color any more than sex or age." n299 Proponents did not quite know how to respond. Even as well-informed a Senator as George Edmunds was unsure about the implications of the Fourteenth Amendment for the question of gender discrimination, stating that he had "never considered the female question." n300 Notably, they did not retort that the Fourteenth Amendment applies to racial classifications only, or that it is irrelevant to distinctions based on sex.

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n298. 3 Cong. Rec. 1861-62 (Feb. 27, 1875). For additional statements on the application of the Fourteenth Amendment to gender, see 2 Cong. Rec. 4171-72 (May 22, 1874) (statement of Sen. Sargent); id. at app. 359 (May 21, 1874) (statement of Sen. Merrimon); id. at 453 (Jan. 7, 1874) (statement of Rep. Atkins); Cong. Globe, 42d Cong., 2d Sess. 3190 (May 8, 1872) (statement of Sen. Ferry).

n299. 2 Cong. Rec. app. 313 (May 22, 1874).

n300. Cong. Globe, 42d Cong., 2d Sess. 3190 (May 8, 1872). For some of Senator Edmunds' subsequent ruminations about sex and age discrimination, see id. at 3260 (May 9, 1872).

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Proponents of the civil rights bill heaped scorn on the opposition's claim that segregation was understood to be equal in its practical effect. The notion that "color and race are reasons for distinctions among citizens," they said, is a "slave doctrine." n301 When compelled by law, the segregation of the races is "an unjust and odious proscription." n302 Segregation is tantamount to "caste." n303 Senator Frelinghuysen called segregation by law "an enactment of personal degradation" and a form of "legalized disa [*1012] bility or inferiority," effectively a denial of citizenship and a return to slavery. n304 Representative Burrows stated that the sole purpose of the separate but equal schools proposal was "the subjugation of the weak of every class and race" and averred that he would "never give [his] vote or voice to the support of any such pernicious doctrine." n305 Representative Rainey said that segregation treats the black man like a leper. n306 Sumner declared that "any rule excluding a man on account of his color is an indignity, an insult, and a wrong." n307 Speaking as floor leader for the bill after Sumner's death, Frelinghuysen addressed the argument at length:

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n301. Cong. Globe, 42d Cong., 2d Sess. 3260 (May 9, 1872) (statement of Sen. Edmunds); accord id. at app. 16 (Feb. 3, 1872) (statement of Rep. Rainey).

n302. 3 Cong. Rec. 945 (Feb. 3, 1875) (statement of Rep. Lynch).

n303. 3 Cong. Rec. 1000 (Feb. 4, 1875) (statement of Rep. Burrows); 2 Cong. Rec. 407 (Jan. 6, 1874) (statement of Rep. Elliott); Cong. Globe, 42d Cong., 2d Sess. 383 (Jan. 15, 1872) (statement of Sen. Sumner). In 1869, Sumner delivered a lecture entitled "On the Question of Caste," published in 13 Works of Charles Sumner 133 (Boston, Lee & Shepard 1880), in which he defined the term "caste" as "any separate and fixed order of society," where one group "claims hereditary rank and privilege" while another is "doomed to hereditary degradation and disability." Id. at 140, 146.

n304. 2 Cong. Rec. 3452 (Apr. 29, 1874).

n305. 3 Cong. Rec. 999 (Feb. 4, 1875).

n306. Cong. Globe, 42d Cong., 2d Sess. app. 16 (Feb. 3, 1872).

n307. Cong. Globe, 42d Cong., 2d Sess. 242 (1872) (statement of Sen. Sumner on Dec. 20, 1871).

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If it be asked what is the objection to classification by race, separate schools for colored children, I reply, that question can best be answered by the person who proposes it asking himself what would be the objection in his mind to his children being excluded from the public schools that he was taxed to support on account of their supposed inferiority of race.

The objection to such a law in its effect on the subjects of it is that it is an enactment of personal degradation.

The objection to such a law on our part is that it would be legislation in violation of the fundamental principles of the nation.

The objection to the law in its effect on society is that "a community is seldom more just than its laws;" and it would be perpetuating that lingering prejudice growing out of a race having been slaves which it is as much our duty to remove as it was to abolish slavery. n308

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n308. 2 Cong. Rec. 3452 (Apr. 29, 1874).

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Proponents of the bill denied that segregated facilities were or could be equal, in light of the message of inferiority conveyed by the arrangement. For

example, in answer to Senator Hill's argument that railroads should be permitted to segregate their passengers by race "provided all the comfort and security be furnished to passengers alike," n309 Sumner replied: "Now let me ask the Senator whether in this world the personal respect that one receives is not [*1013] an element of comfort? If a person is treated with indignity, can he be comfortable?" n310

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n309. Cong. Globe, 42d Cong., 2d Sess. 242 (1872) (Sen. Hill speaking on Dec. 20, 1871).

n310. Id. at 243.

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The proponents also argued that desegregation was necessary as a political guarantee that facilities would even be materially equal. Sumner stated that it was "impossible... for a separate school to be the equivalent of the common school." He explained that "white parents will take care not only that the common school is not neglected, but that its teachers and means of instruction are the best possible, and the colored child will have the benefit of this watchfulness." n311 Frelinghuysen asserted that "we know that if we establish separate schools for colored people, those schools will be inferior to those for the whites" because the whites are politically dominant and will favor their own. n312 "The value of the principle of equality in government is that thereby the strength of the strong inures to the benefit of the weak ...." n313 In a later speech, Edmunds presented extensive evidence of the actual inequality of the schools, arguing that segregation enabled states "to grind out every means of education that the colored man can have, and to feed the white at the expense of the black." n314

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n311. Id. at 384 (Jan. 15, 1872).

n312. 2 Cong. Rec. 3452 (Apr. 29, 1874).

n313. Id.

n314. Id. at 4173 (May 22, 1874).

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Sumner went to extraordinary lengths to refute the claim that black citizens favored racial segregation. For an entire day, January 15, 1872, Sumner read and commented upon a large number of letters, petitions, and resolutions from all over the country, representing many thousands of black citizens complaining of exclusion from schools, common carriers, and public accommodations on grounds of race and asking for enactment of the civil rights bill. The report of this oration consumes seventeen columns of small type in the Congressional Globe. n315 A typical letter was that from Mr. J.F. Quarles of Georgia, who wrote:

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n315. See Cong. Globe, 42d Cong., 2d Sess. 429-34 (Jan. 7, 1872).

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In whatever direction we go, whether it be in public places of amusement, in the street cars, upon the railroad, in the hotel, or in the way-side inn, we encounter the invidious distinction of caste and oligarchy. We cannot think of these things without impa [*1014] tience; we cannot speak of them without denouncing them as unworthy of an intelligent and humane people. Nay, we would be less than men if we did not everywhere, and under all circumstances, utter our earnest and solemn protest against this inhuman outrage upon our manhood. n316

Two weeks later, Sumner was at it again, filling eleven more columns with letters and commentary to the same effect. n317 Similarly, in the House, Alonzo Ransier, a black South Carolinian, declared that "I know that I speak for five million people" in support of the bill, and read into the record memorials from three national or regional conventions of African-Americans expressing their support for the bill in the strongest of terms. n318

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n316. Id. at 429.

n317. See id. at 726-29 (Jan. 31, 1872).

n318. 2 Cong. Rec. 1311-12 (Feb. 7, 1874).

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Most of all, proponents of the bill insisted that school segregation was based solely on "prejudice" and would foster "prejudice." n319 Representative Williams of Wisconsin interpreted segregation as "teaching our little boys that they are too good to sit with these men's children in the public school-room, thereby nurturing a prejudice they never knew, and preparing these classes for mutual hatred hereafter...." n320 Representative Butler commented that "the only argument which has been introduced here [is] the argument to prejudice." n321 "The God-given color of the African," Sumner said, "is a constant offense to the disdainful white," but the "equal rights, promised by the great Declaration" must not be "sacrificed to a prejudice." n322

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n319. See, e.g., id. at 408 (Jan. 6, 1874) (statement of Rep. Elliott).

n320. 3 Cong. Rec. 1002 (Feb. 4, 1875).

n321. 2 Cong. Rec. 457 (Jan. 7, 1874).

n322. Cong. Globe, 42d Cong., 2d Sess. 384 (Jan. 15, 1872).

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c. The Distinction Between Civil Rights and Social Rights

The final argument in defense of segregation was that the intermixing of the races was not a civil, but a social right. This argument conceded that all citizens had a civil right to access to facilities of equal quality, but characterized the additional requirement of desegregation as an attempt to enforce "social equality," which was beyond the reach of congressional authority under the [*1015] Fourteenth Amendment. n323 Representative Robert Vance of North Carolina, for example, was willing to concede that "one of the civil rights of the colored man undoubtedly is the right to be educated out of moneys raised by taxation," but maintained that the right to "go into the same school with white children, mixing the colored children and the white children in the same schools" is a "social right instead of a civil right." n324 Representative Aylett Buckner of Missouri claimed that

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n323. This argument should not be confused with the argument, made most prominently by Senator Lyman Trumbull, that education itself is not a civil right. See infra Part II.C.2.

n324. 2 Cong. Rec. 555 (Jan. 10, 1874).

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[the blacks' complaint is] not that they are excluded from transportation on railroads and other means of conveyance, not that they do not frequent places of amusement, not that they are compelled to take shelter from the elements in the public street or in the open highway, nor that their children are deprived of elementary education in the public schools. This is not the ground of pretended complaint. It is that they do not eat at the same table and sleep in the same bed with the whites; that they do not ride in the same car, and laugh at the stale jokes of circus-clowns from the same seat; that their children are not sandwiched between the blue-eyed German and the black-eyed American, at the same desk and con the same lessons from the same book, and that the same earth that conceals the dead body of the white man from sight shall cover the corpse of the negro. n325

According to Buckner, this meant that "it is not civil rights but social rights that [the bill] seeks to enforce and protect. It is not equality before the law, but equality in society, that Massachusetts hankers after with such avidity." n326 Another opponent made the point by proposing an amendment to the title of the bill, to "change it from "civil rights' to "social rights.' " n327 This argument was repeated over and over again. n328 So common was the social [*1016] equality argument that Republicans called it the "great bugaboo" of the opposition. n329

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n325. Id. at 428 (Jan. 6, 1874).

n326.

Id.

n327. Cong. Globe, 42d Cong., 2d Sess. 4321 (June 7, 1872) (statement of Sen. Brooks).

n328. See, e.g., 3 Cong. Rec. 949 (Feb. 3, 1875) (statement of Rep. Finck); 2 Cong. Rec. 411 (Jan. 6, 1874) (statement of Rep. Blount); Cong. Globe, 42d Cong., 2d Sess. 3251 (May 9, 1872) (statement of Sen. Blair); id. at 819 (Feb. 5, 1872) (statement of Sen. Norwood); id. at app. 9 (Jan. 30, 1872) (statement of Sen. Saulsbury); id. at 242 (1872) (statement of Sen. Hill on Dec. 20, 1871).

n329. 3 Cong. Rec. 957 (Feb. 3, 1875) (statement of Rep. Cain).

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No one seemed to notice that this argument contradicted the opposition's other argument: that segregation does not constitute inequality and is equally desirable for both races. Democrats were in the awkward position of arguing that segregation does not impart a social meaning of inequality, and that the inequality it imparts is merely social.

The "social rights" argument was based on a tripartite division of rights, universally accepted at the time but forgotten today, between civil rights, political rights, and social rights. n330 Supporters and opponents of the bill alike agreed that the Fourteenth Amendment had no bearing on "social rights." This underscores that the dominant Republican position was based not so much on an abhorrence of racial discrimination as a general moral evil as on a particular understanding of the concept of citizenship. n331 Because of the modern association of desegregation with opposition to racism in all its forms, the persistence of racist attitudes and "negrophobia" among many Republicans has been taken as evidence that they could not have been committed to desegregation of schools and other public institutions. n332 But this inference is unreliable. To the Republicans of the Reconstruction period, equality of civil rights was not necessarily linked to equality in general, and particularly not to social equality. The issue, for them, was not relations between the races but realization of an ideal of a government of citizens who were equal in their rights before the law, however unequal they might be in other respects. Thus, General Butler, one of the most radical of the Radicals, could declare:

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n330. See Cong. Globe, 42d Cong., 2d Sess. 901 (Feb. 8, 1872) (statement of Sen. Trumbull). This distinction is discussed at greater length below. See infra notes 365-69, 376-86 and accompanying text.

n331. See Maltz, Reconstruction Without Revolution, supra note 203, at 224.

n332. See Berger, supra note 13, at 10-16; Herbert Hovenkamp, Social Science and Segregation Before Brown, 1985 Duke L.J. 624, 638, 648.

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"Equality!" We do not propose to legislate to establish any equality. I am not one of those who believe that all men were created equal, if equality is to be used in its broadest sense. I believe that "equal" in the Declaration of Independence is a political [*1017] word, used in a political sense, and means equality of political rights. n333

Senator Morton similarly stated that "we have a constitutional amendment that makes all men equal before the law. It does not make them all equal in point of intellect, in point of property, in point of education, but they have equal rights before the law." n334

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n333. 2 Cong. Rec. 455 (Jan. 7, 1874).

n334. 3 Cong. Rec. 1795 (Feb. 26, 1875).

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But while agreeing that the Fourteenth Amendment did not extend to "social rights," opponents and proponents of the bill were far from agreement about what those rights were. There were no attempts at systematic definition from either side, n335 but opponents of the bill apparently viewed the category as encompassing all rights that relate to social interaction or contact between the races. Thus, Senator Saulsbury framed the argument in terms of the proponents' supposed "desire to enforce familiarity, association, and companionship between the races." n336 Senator Blair called it an attempt "to impose upon the whites of the community the necessity of a close association in all matters with the negroes." n337 Several speakers claimed that the principle of the bill would extend to private homes and associations. Senator Hill, for instance, said that "what [Sumner] may term a right may be the right of any man that pleases to come into my parlor and to be my guest. That is not the right of any colored man upon earth, nor of any white man, unless it is agreeable to me." n338 Representative Durham argued that "we have no more right or power to say who shall enter a theater or a hotel and be accommodated therein than to say who shall enter a man's private house or enter into any social amusement to pass away an evening's hour." n339

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n335. But see 2 Cong. Rec. 407 (Jan. 6, 1874) (statement of Rep. Elliott, quoting Lieber on Civil Liberty at 25: "By civil liberty is meant, not only the absence of individual restraint, but liberty within the social system and political organism - a combination of principles and laws which acknowledge, protect, and favor the dignity of man.") Neither this nor any other attempted definition explained the distinction between civil, political, and social rights, however.

n336. 2 Cong. Rec. 4158 (May 22, 1874).

n337. Cong. Globe, 42d Cong., 2d Sess. 3251 (May 9, 1872).

n338. Id. at 242 (1872) (statement of Sen. Hill on Dec. 20, 1871).

n339. 2 Cong. Rec. 405 (Jan. 6, 1874).

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A significant undercurrent in the discussion of social rights was the fear that intermixing would lead to miscegenation, and that the theory of the Fourteenth Amendment underlying the bill would logically extend to a right of racial intermarriage. n340 Representative James Harper of North Carolina, for example, posed the question:

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n340. See 2 Cong. Rec. 556 (Jan. 10, 1874) (statement of Rep. Vance); Cong. Globe, 42d Cong., 2d Sess. 3252 (May 9, 1872) (statement of Sen. Blair); id. at 819 (Jan. 5, 1872) (statement of Sen. Norwood); id. at 242 (1872) (statement of Sen. Hill on Dec. 20, 1871). For a thorough analysis of the constitutional debates during this period on the issue of miscegenation, see Steven A. Bank, Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875, 2 U. Chi. Sch. Roundtable 303 (1995).

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If Congress has the power to pass this bill and make it a law it has the power to enact laws to regulate the minutest social observances of domestic or fashionable life. If it has the right to say to my neighbor, "You must ride in the same car, eat at the same table, and lodge in the same room with a negro," it can also say that you must not interpose an objection on account of his color to any advances he may make toward your children or family. n341

It was a telling argument, because perceived support for racial intermarriage was a clear political liability. n342 But it is striking that not a single supporter of the 1875 Act attempted to deny that under their interpretation, anti-miscegenation laws were unconstitutional. n343 For the most part, Republicans diverted the argument with comments mocking Southerners for the frequency of miscegenation under slavery. n344 African-American congressmen were es-

[*1019] pecially bitter. Typical was the comment of Representative Ransier of South Carolina:

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n341. Cong. Globe, 42d Cong., 2d Sess. app. 372 (May 4, 1872).

n342. Rep. John Atkins commented that "all statesmen of all parties - indeed, the public sentiment of the colored people themselves - approve of the ordinance and statutes, now common in many of the States, which forbids intermarriage of the races." 2 Cong. Rec. 453 (Jan. 7, 1874). See Foner, supra note 21, at 321.

n343. Remarkably, at least two state supreme courts struck down state anti-miscegenation laws as conflicting either with the Fourteenth Amendment or with the Civil Rights Act of 1866. Burns v. State, 48 Ala. 195 (1872), limited by Ford v. State, 53 Ala. 150 (1875), overruled by Green v. State, 58 Ala. 190 (1877); Hart v. Hoss & Elder, 26 La. Ann. 90 (1874); Glasrud, supra note 171, at 53 (reporting that "in 1877 the courts voided the [Texas] prohibition as a violation of the Fourteenth Amendment and the Civil Rights Act of 1875"). In addition, the legislatures of six states eliminated their anti-miscegenation laws in the 1870s or 1880s. See Bank, supra note 340, at 343-44; Virginia Dominguez, White by Definition: Social Classification in Creole Louisiana 26 (1986).

n344. See, e.g., 2 Cong. Rec. 456 (Jan. 7, 1874) (statement of Rep. Butler); id. at 382 (Jan. 5, 1874) (statement of Rep. Ransier); see also Cong. Globe, 42d Cong., 2d Sess. 3253 (May 9, 1872) (statement of Sen. Wilson) ("Under freedom there is not a tenth part of the improper associations between the races that existed before the war.").

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These negro-haters would not open school-houses, hotels, places of amusement, common conveyances, or the witness or the jury box to the colored people upon equal terms with themselves, because this contact of the races would, forsooth, "result injuriously to both." Yet they have found agreeable associations with them under other circumstances which at once suggest themselves to us; nor has the result of this contact proved injurious to either race so far as I know, except that the moral responsibility rests upon the more refined and cultivated. n345

Butler, noting that "the highest exhibition of social equality is communication between the sexes," remarked that he was "inclined to think that the only equality the blacks ever have in the South is social equality." n346

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n345. 2 Cong. Rec. 382 (Jan. 5, 1874). In a similar vein, see 3 Cong. Rec. app. 108 (Feb. 27, 1875) (statement of Rep. Lewis Carpenter); id. at 957 (Feb. 3, 1875) (statement of Rep. Cain).

n346. 3 Cong. Rec. 1006 (Feb. 4, 1875).

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But when forced to take a position, proponents defended the proposition that the law should make no distinction on the basis of race in marriage. Sumner himself responded to one Democratic diatribe about miscegenation as follows: "I desire that every word in the laws of this land shall be brought in harmony with the Constitution of the United States; and if in any way the legislation, which the Senator now calls attention to, is repealed or annulled, so much the better." n347 Similar statements were made by Senators Harlan n348 and Pomeroy. n349 These particular comments may be dismissed on the ground that the speakers were Radicals and not representative of the Republican mainstream, n350 but it is harder to dismiss the fact that other supporters of the bill refrained from

[*1020] defending anti-miscegenation laws despite what must have been substantial political pressure to do so. n351

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n347. Cong. Globe, 42d Cong., 2d Sess. 872 (Feb. 7, 1872).

n348. Id. at 878 (Feb. 7, 1872).

n349. Id. at 821 (Feb. 5, 1872) ("We shall not now argue for a law to restrain men from associating together whom God hath made of one blood.... If any one in Georgia is suffering from a law of that kind it ought to be repealed.")

n350. See Alfred Avins, Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent, 52 Va. L. Rev. 1224, 1253-54 (1966).

n351. This is in contrast to the debates over the Civil Rights Act of 1866, during which several Republican supporters of the bill disavowed any intention to prohibit anti-miscegenation laws, and relied on the symmetrical equality argument in explanation of their position. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 505 (Jan. 30, 1866) (statement of Sen. Fessenden); id. at 322 (Jan. 19, 1866) (statement of Sen. Trumbull).

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In making these arguments, the Democrats frequently conflated the question of whether miscegenation should be permitted with the inflammatory proposition that the Republicans would make miscegenation mandatory. Representative James Beck of Kentucky asserted that some supporters of the bill would want to "arrest, imprison, and fine a young woman in any State of the South if she were to refuse to marry a negro man on account of color, race, or previous condition of servitude, in the event of his making her a proposal of marriage, and her refusing on that ground." n352 Representative William Crutchfield of Tennessee sarcastically proposed an amendment to the bill that would make it a crime for a white woman to refuse the marriage proposal of a black man on account of race. n353 This paralleled claims that the desegregation bill would outlaw discrimination in private homes or private relationships. The "next step," according to William Read of Kentucky, "will be that they [blacks] will demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters." n354

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n352. 2 Cong. Rec. 343 (1874) (statement of Rep. Beck on Dec. 19, 1873).

n353. Id. at 452 (Jan. 7, 1874).

n354. Id. at app. 343 (May 29, 1874). See also id. at 4171 (May 22, 1874) (statement of Sen. Sargent) ("I doubt if the office of the fourteenth amendment is to provide that I should receive any man into my house; that my liberties shall be encroached upon for the benefit of any man, be he white or black.").

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This hyperbole exposed the basic contradiction in the Democrats' position with regard to state interference in the private sphere. If it were true, as the opponents of the bill maintained, that individuals should be free to choose whether and on what terms to mingle with persons of the other race, then it should have followed that anti-miscegenation laws, which interfere with that freedom, are illegitimate. At the time of these debates, this contradiction did not extend to the issue of segregation in common carri [*1021] ers, because no state then required segregation. But by the time of Plessy, after the passage of Jim Crow laws, the Democrats' position that "social rights" could not be the subject of legislation was - or should have been - a serious embarrassment.

The defense of the bill relied heavily on the distinction between the private and civil spheres. Locating the issue of "social equality" in the private sphere, supporters could deny that there was any "question of social equality in this bill." n355 They distinguished between spheres of life, such as one's own home or friendships, in which each person has the unquestioned right to decide with whom he will associate, and public facilities, in which the individual has no option but to accept the company of others not of his own choosing. Senator Sumner stated that each person "is always free to choose who shall be his friend, his associate, his guest," but when he "walks the streets ... he is subject to the prevailing law of Equality." n356 Senator Pratt stated that "the negro does not seek nor does this bill give him any of your peculiar social rights and privileges. You may still select your own society and invite whom you will to your table." But, he went on, "if you will travel in a public conveyance, you must be content to share your convenience with the Indian, negro, Turk, Italian, Swede, Norwegian, or any other foreigner who avails himself of the same facility, because it is public, and should therefore be open to all." He noted that "if you choose to sit down at a public table in a public inn open to all comers who behave themselves, you must be content to sit beside or opposite to somebody whose skin or language, manners or religion, may shock your sensibilities." You do not have to "talk to him or even look at him, much less make his acquaintance." n357 He asserted that, within the public sphere everyone must accept the [*1022] equal right of negroes, to avail themselves of the same facilities. n358 As Senator Nye pointed out, "If I am placed at a table in inconvenient juxtaposition to a man I do not like, it is not my work to get him out, but to get out myself." n359

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n355. 2 Cong. Rec. at 427 (Jan. 6, 1874) (statement of Rep. Stowell); accord 3 Cong. Rec. 979 (Feb. 4, 1875) (statement of Rep. E.R. Hoar); id. at 940 (Feb. 3, 1875) (statement of Rep. Butler); id. at 944 (statement of Rep. Lynch); id. at 960 (statement of Rep. Rainey); 2 Cong. Rec. 3451 (Apr. 29, 1874) (statement of Sen. Frelinghuysen); id. at 382 (Jan. 5, 1874) (statement of Rep. Ransier); id. at 344 (1874) (statement of Rep. Rainey on Dec. 19, 1873); Cong. Globe, 42d Cong., 2d Sess. 4321 (June 7, 1872) (statement of Sen. Poland); id. at 382 (Jan. 5, 1872) (statement of Sen. Sumner).

n356. Cong. Globe, 42d Cong., 2d Sess. 382 (Jan. 15, 1872).

n357. 2 Cong. Rec. 4082 (May 20, 1874)

n358. See id. For a similar analysis, see 3 Cong. Rec. 940 (Feb. 3, 1875) (statement of Rep. Butler).

n359. Cong. Globe, 42d Cong., 2d Sess. 706 (Jan. 30, 1872).

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Representative Chester Darrall of Louisiana invoked the impeccable authority of former Confederate General P.G.T. Beauregard, commander during the assault on Fort Sumter. He quoted Beauregard as saying:

It would not be denied that in traveling and at places of public resort we often share these privileges in common with thieves, prostitutes, gamblers, and others who have worse sins to answer for than the accident of color; but no one ever supposed that we thereby assented to the social equality of these people with ourselves. I therefore say that participation in these public privileges involves no question of social equality. n360

John Lynch, a black congressman from Mississippi, made a similar point:

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n360. 2 Cong. Rec. app. 479 (June 16, 1874).

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If by conferring upon colored people the same rights and privileges that are now exercised and enjoyed by whites indiscriminately will result in bringing about social equality between the races, then the same process of reasoning must necessarily bring us to the conclusion that there are no social distinctions among whites, because all white persons, regardless of their social standing, are permitted to enjoy these rights. n361

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n361. 3 Cong. Rec. 944 (Feb. 3, 1875).

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Thus, under the proponents' analysis, a prohibition of segregation within the covered institutions was an issue of civil, not social, rights. The responsibilities of these institutions to serve all members of the public without unreasonable discrimination were governed by law. The individual's social rights included his own choice of associates, but did not include a right to expect that other persons whom he found undesirable (whether on the grounds of race or otherwise) would be denied access to common carriers or public accommodations, or shuffled off into separate facilities. The effect of the Fourteenth Amendment was not to alter the boundary [*1023] between civil and social rights, but to make race an unreasonable basis for discrimination

within the civil sphere.

2. Education Is Not a Civil Right Protected by the Fourteenth Amendment

The opponents' second principal constitutional argument was that schools are not within the coverage of the Fourteenth Amendment. From a modern perspective, this may seem a peculiar, even preposterous, point. Public schools are an arm of the state; all state action is covered by the Fourteenth Amendment. But from the perspective of the Reconstruction era, the issue was far more complicated, and there is a plausible argument that the public schools as they existed at that time, especially in the South, were not covered. As discussed above, under the theory of "limited absolute equality" n362 that prevailed at the time, the Amendment did not require equality with respect to everything, but only with respect to civil rights, the "privileges or immunities of citizens." To the constitutional lawyers of the Reconstruction Congress, the key question was whether public education was a civil right.

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n362. See Maltz, supra note 13, at 68; supra notes 203-206 and accompanying text.

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a. The Concept of "Civil Rights"

The most important member of the forces opposing Sumner's civil rights bill in the early years was Senator Lyman Trumbull of Illinois. n363 Trumbull, a highly respected constitutional lawyer and former state supreme court justice, had begun his career as a Free Soil Democrat but had shifted parties to become one of the leading Republicans in the Senate during the Lincoln administration. As Chairman of the Judiciary Committee, he had introduced the resolution that became the basis for the Thirteenth Amendment, supported the Freedmen's Bureau, and been the principal author of the Civil Rights Act of 1866. By 1872, however, he was shifting back to the Democratic fold: he supported Greeley in 1872, was counsel to Tilden in 1876-77, and ran for governor of Illinois as a Democrat in 1880. Trumbull's opposition to Sumner's bill was instrumental in preventing its consideration for almost two years, [*1024] from 1870 until late in 1871. Trumbull was joined in his opposition by two other prominent Republicans, Lot Morrill of Maine n364 and Orris Ferry of Connecticut, whose arguments were similar to Trumbull's.

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n363. For background on Trumbull's life, see 19 Dictionary of American Biography 19-20 (Dumas Malone, ed., 1936); Horace White, The Life of Lyman Trumbull (1913).

n364. This Morrill should not be confused with his cousin, Justin Morrill of Vermont. The latter Morrill voted in favor of the Fourteenth Amendment in the 39th Congress and consistently supported Sumner's bill.

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Trumbull based his argument against the bill on the widely accepted taxonomy of rights as civil, political, and social. It was generally understood that the nondiscrimination requirement of the Fourteenth Amendment applied only to "civil rights." Political and social rights, it was agreed, were not civil rights and were not protected. n365 (The issue was complicated by the adoption of the Fifteenth Amendment, which forbade racial discrimination with respect to the quintessential political right, the right to vote, making the lack of protection for lesser political rights anomalous.) This taxonomy of rights is rooted in the relationship of the Privileges or Immunities Clause of the Fourteenth Amendment to the Privileges and Immunities Clause of Article IV. The most fundamental conception of the Fourteenth Amendment was that it would extend to the citizens of each state, without regard to race or color, the same legal rights (privileges and immunities) that would have been available to citizens of other states under Article IV. n366 This included such civil rights as the right to contract, own property, and sue, but not political rights such as the right to vote, hold office, or serve on a jury. This explains why Section 2 of the Fourteenth Amendment presupposes the rights of states to restrict the [*1025] franchise, and why the Fifteenth and Nineteenth Amendments were necessary to extend the right to vote to blacks and to women, respectively.

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n365. See, e.g., Cong. Globe, 42d Cong., 2d Sess. 901 (Feb. 8, 1872) (statement of Sen. Trumbull) (civil rights legislation should be "confined exclusively to civil rights and nothing else, no political and no social rights"). On the proposition that the Fourteenth Amendment did not extend to social rights, see Mark Tushnet, Civil Rights and Social Rights: The Future of the Reconstruction Amendments, 25 Loy. L.A. L. Rev. 1207 (1992); supra notes 323-39 and accompanying text. On the proposition that the Fourteenth Amendment did not protect political rights, see, e.g., 2 Cong. Rec. app. 314 (May 22, 1874) (statement of Sen. Merrimon); Cong. Globe, 42d Cong., 2d Sess. 843 (Feb. 6, 1872) (statement of Sen. Carpenter); id. at 844 (statement of Sen. Sherman). Thus, Senator Carpenter opposed the jury provisions of Sumner's bill on the ground that jury service was a political right. Cong. Globe, 42d Cong., 2d Sess. 827-28 (1872).

n366. See Cong. Globe, 42d Cong., 2d Sess. 436 (Jan. 17, 1872) (statement of Sen. Frelinghuysen). For a concise statement of my understanding of this relationship, see Michael W. McConnell, The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?, 25 Loy. L.A. L. Rev. 1159, 1160-61 (1992).

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This categorization of rights plays no part in current interpretations of the Fourteenth Amendment. The distinction between civil and political rights has been utterly obliterated. Rights of political participation are now routinely litigated under the Equal Protection Clause, and the right to vote is commonly said to be the most "fundamental" of our civil rights, because it is

"preservative of all rights." n367 The problem of "social rights" is handled under current law through a combination of the state action doctrine n368 and assertions of countervailing individual rights, especially privacy and freedom of association. n369 Nonetheless, this tripartite division of rights forms the essential framework for interpreting the Amendment as it was originally understood.

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n367. Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Reynolds v. Sims, 377 U.S. 533, 562 (1964). For a theoretical exposition, see John Hart Ely, Democracy and Distrust 116-25 (1980).

n368. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

n369. See, e.g., Roberts v. United States Jaycees, 468 U.S. 609 (1984).

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Trumbull based his opposition to the Sumner bill on the ground that education was not a civil right. This became clear during colloquies with Senator Edmunds of Vermont and Senator Morton of Indiana:

Mr. EDMUNDS. How about the right to go to a public school?

Mr. TRUMBULL. The right to go to school is not a civil right and never was.

Mr. EDMUNDS. What kind of a right is it?

Mr. TRUMBULL. It is not a right.

Mr. EDMUNDS. What is it?

Mr. TRUMBULL. It is a privilege that you may have to go to school.

....

Mr. MORTON. I ask the Senator if the right to go to school is not a civil right, what kind of a right is it, or is it any right at all?

Mr. TRUMBULL. It is not any right at all. It is a matter to be regulated by the localities. n370

[*1026] The logical implication of Trumbull's position was that the federal government lacked any authority under the Fourteenth Amendment to interfere in state administration of public schools. Lot Morrill made this explicit: "in reference to all rights with regard to the matters of education, worship, amusement, recreation, entertainment, all of which enter so essentially into the private life of the people, ... they all belong exclusively to the State, of which the Government of the United States has no right to take cognizance." n371 Ferry argued that public schools are necessarily creatures of local communities, which cannot be regulated or controlled by federal legislation. n372 These views were echoed by many Democrats n373 and were reinforced by the Slaughter-House

decision. n374 As stated by Representative Durham of Kentucky, "We have no more right to say that a particular class of individuals shall have access to our public schools ... than we have to say that a particular class of individuals shall have access to private schools. These are matters purely of local legislation or of private contract." n375

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n370. Cong. Globe, 42d Cong., 2d Sess. 3189-90 (May 8, 1872).

n371. Id. at app. 5 (Jan. 25, 1872).

n372. Id. at 3257 (May 9, 1872).

n373. E.g., 2 Cong. Rec. 453 (Jan. 6, 1874) (statement of Rep. Atkins); id. at 376 (Jan. 5, 1874) (statement of Rep. Harris); Cong. Globe, 42d Cong., 2d Sess. app. 42-43 (Feb. 8, 1872) (statement of Sen. Vickers); see also 2 Cong. Rec. 419 (Jan. 6, 1874) (statement of Rep. Herndon); id. at 405 (statement of Rep. Durham); id. at 385 (Jan. 5, 1874) (statement of Rep. Mills).

n374. 83 U.S. (16 Wall.) 36 (1873).

n375. 2 Cong. Rec. 405 (Jan. 6, 1874).

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But what did Trumbull and his allies mean by the statement that education is not a "civil" right? Neither he nor any other opponent of the Sumner bill defined precisely what they meant by the term. n376 In the space of a single column of the Congressional Globe, Trumbull defined civil rights variously as "rights pertaining to the citizen as such," as "general rights that belong to mankind everywhere," and as "a common law right." n377 Indeed, the debate is all the more difficult to decipher because the various participants seemed unaware that the term was being used in different ways. There was no pretense of precision. We must therefore reconstruct [*1027] this constitutional theory on the basis of mostly casual and sometimes incoherent statements.

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n376. Cong. Globe, 42d Cong., 2d Sess. 3191 (May 8, 1872).

n377. See Id.

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It is useful to begin with the areas of agreement and move toward the areas of controversy. At a minimum, we may be confident that the category of civil rights comprised the rights protected by the Civil Rights Act of 1866: the rights to make and enforce contracts; to buy, lease, inherit, hold and convey property; to sue and be sued and to give evidence in court; to legal protections for the security of person and property; and to equal treatment under the criminal law. n378 These were roughly the same rights that were protected under the Privileges and Immunities Clause of Article IV, which applied to citizens of other states. n379 Some opponents, including Trumbull, appeared to believe that the Civil Rights Act of 1866 comprised an exhaustive list of the privileges

and immunities of citizens. As Trumbull explained:

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n378. Civil Rights Act of 1866, Ch. 31, 1, 14 Stat. 27.

n379. Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230); Douglass v. Stephens, 1 Del Ch. 465 (1821); Campbell v. Morris, 3 H. & McH. 535, 565 (Md. 1797); Abbot v. Bayley, 23 Mass. (6 Pick.) 89, 91-92 (1827); State v. Medbury, 3 R.I. 138 (1855). See generally Theodore Ullyot, The Understanding of the Phrase "Privileges and Immunities of Citizens" in Antebellum Jurisprudence: Interpretive Essay (unpublished manuscript, on file with the Virginia Law Review Association) (arguing that in antebellum jurisprudence, "Privileges and Immunities of citizens" was clearly understood to encompass purely personal rights only).

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In regard to the rights that belong to the individual as man and as a freeman under the Constitution of the United States, I think we had a right to pass the civil rights bill. I thought so then, and think so now; but I think that we went to the verge of constitutional authority, went as far as we could go. n380

This was not, however, a logically satisfying position. There is every reason to believe that the Civil Rights Act of 1866 encompassed the principal civil rights directly contemplated by the framers of the Fourteenth Amendment, but much less reason to assume that it exhausted those rights. Indeed, leading cases interpreting the Privileges and Immunities Clause of Article IV made clear that this list of rights was not exclusive. In Corfield v. Coryell, the lead [*1028] ing pre-War precedent interpreting the Privileges and Immunities Clause, the court listed rights similar to those in the 1866 Act, and then stated "these, and many others which might be mentioned, are, strictly speaking, privileges and immunities." n381 Thus, Lot Morrill was forced to define "privileges and immunities" as meaning "those common privileges which one community accords to another in civilized life." n382 The question becomes: how do we determine what those privileges are?

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n380. Cong. Globe, 42d Cong., 2d Sess. 901 (Feb. 8, 1872) (statement of Sen. Trumbull); see id. at 3189 (May 8, 1872) (statement of Sen. Trumbull); see also 2 Cong. Rec. app. 1-3 (Jan. 4, 1874) (statement of Rep. Southard, maintaining that no protection of the rights of colored people beyond the 1866 Act was required); Berger, supra note 13, at 22-36 (asserting that "fundamental rights" already received full protection).

n381. 6 F. Cas. 546, 551-52, No. 3230 (C.C.E.D. Pa. 1823) (emphasis added). Moreover, at the time when Congress went to the verge of its constitutional authority (1866), the Fourteenth Amendment had not been passed. Implicitly, Trumbull's position is that the Fourteenth Amendment added nothing.

n382. Cong. Globe, 42d Cong., 2d Sess. app. 4 (Jan. 25, 1872).

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At the heart of the question is a conceptual uncertainty, running throughout the debates, over whether civil rights are those protected in the actual positive law of the states, or whether the category refers to a set of rights inherent in a free society and therefore beyond the reach of hostile legislation. The most common resolution of this ambiguity was probably a merger of these conceptions: privileges and immunities were established by the positive law of the state, but only those rights deemed "fundamental" were a privilege or immunity of citizenship. n383 What rights are "fundamental"? The three most common criteria seemed to be that such rights were uniform, not varying from state to state; that they were a permanent and stable part of the American legal legacy, not subject to the vicissitudes of legislative policy; and that they were legally enforceable as a matter of right, as opposed to being privileges allocated among the citizens by government officials at their discretion. n384 The leading exemplars were common law rights. That is why the Civil Rights Act of 1866, which included the most basic common law rights, defined the uncontroversial core of "civil rights."

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n383. Corfield, 6 F. Cas. at 551.

n384. See 2 Cong. Rec. 384-385 (Jan. 5, 1874) (statement of Rep. Mills) (arguing that rights under state law could not be privileges or immunities under the Fourteenth Amendment because they are not "fixed and absolute," nor "uniform," but "changeable" and subject to the "discretion of the state").

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Sumner stated that "all institutions created or regulated by law" n385 are within the civil sphere, but this should not be taken literally. As Thurman asked rhetorically:

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n385. Cong. Globe, 42d Cong., 2d Sess. 382 (Jan. 15, 1872).

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What is there, within the province of government, that is not regulated by law? The Senator is regulated by law; I am regulated by law; every man of us is regulated by law.... Does that prove that you have the right to interfere and say, "Under the pretense of regulation we will deprive you of your liberty?" n386

Elsewhere, Sumner explained that he referred to businesses given monopoly advantages or other "peculiar privileges and prerogatives" and that were subject to "peculiar responsibilities ... regulated by law." n387 This included entities having common carrier or public accommodation responsibilities, but did not extend to such private entities as ordinary businesses or corporations, even though corporations are "created or regulated by law" in a certain sense. The

distinction corresponds roughly to the notion of businesses deemed to be "affected with a public interest," which were subject to economic regulation under the jurisprudence of the day. n388

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n386. Id. at app. 29 (Feb. 6, 1872).

n387. Id.

n388. See Munn v. Illinois, 94 U.S. 113, 126 (1876). It is no coincidence that Munn, decided in 1876, shares the world view of the Congress of 1871-75.

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b. Access to Common Carriers and Public Accommodations

Trumbull, Ferry, Lot Morrill, and their Democratic allies opposed the entire civil rights bill, but opposed the common carrier and public accommodations provisions on different grounds than the public schools provision. As to the former, opponents offered two different arguments. Some, including Trumbull and Ferry, did not deny that these provisions involved civil rights, but maintained that the rights were already adequately protected under common law. Ferry denied that there was any evidence that "colored people any more than white people are by law or by custom denied the accommodations furnished by innkeepers or common carriers." n389 Even if there were occasional cases of exclusion, whether of black or of white, "in both instances the law as it now stands affords to [*1030] each identically the same remedy." n390 Similarly, Trumbull maintained that "the colored man has just the same right of action against a railroad company or a hotel-keeper that a white man has for a refusal to receive or entertain him or to transport him on the cars. The rights are the same to all." n391 Opponents conceded that federal legislation would be warranted if states were to enact statutes discriminating on the basis of race. n392

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n389. Cong. Globe, 42d Cong., 2d Sess. 3257 (May 9, 1872).

n390. Id.; see also id. at 892-94 (Feb. 8, 1872) (argument by Sen. Ferry that blacks and whites enjoy equal remedies under the laws of the states).

n391. Id. at 3190 (May 8, 1872); accord 2 Cong. Rec. 429 (Jan. 6, 1874) (statement of Rep. Buckner); Cong. Globe, 42d Cong., 2d Sess. 3192 (May 8, 1872) (statement of Sen. Trumbull).

n392. See, e.g., 2 Cong. Rec. 454 (Jan. 7, 1874) (statement of Rep. Atkins).

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In the most systematic statement of this position, Thurman reasoned that even if common law rights, such as the equal benefit of common carriage, were privileges and immunities of citizens, the Fourteenth Amendment, by its terms,

applies only when a state "makes or enforces" a "law" that abridges those rights. The civil rights bill was therefore unconstitutional because it would provide federal jurisdiction and a federal remedy to any person denied access to hotels, railroads, and other covered facilities, whether or not the state in which the act occurred provided an adequate remedy for the violation. n393 Thurman used the example of Louisiana, a state with a strong antidiscrimination law:

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n393. 2 Cong. Rec. 4085 (May 20, 1874); Cong. Globe, 42d Cong., 2d Sess. 496 (Jan. 22, 1872). Less sophisticated versions of this argument were offered by Rep. Atkins, 2 Cong. Rec. 454 (Feb. 9, 1874), and Sen. Tipton, Cong. Globe, 42d Cong., 2d Sess. 914 (Jan. 7, 1872).

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This bill says to a Louisianian, "Although your State has made a law that negro men shall have equal privileges in theaters, churches, and places of public resort with the white men in your State; although you punish any one who shall deprive them of that privilege or immunity, or refuse it to them; although your State has made no law to deprive them of any such privilege or immunity; although your courts enforce no law to deprive them of such privileges and immunities; although just the contrary is the truth; ... yet we step in and take from your State courts the jurisdiction over this subject and take it all into the Federal courts ....

... And yet it is said that this bill is constitutional under an amendment to the Constitution which only gives you authority to act where the State has made or enforced a law that deprived a [*1031] citizen of his privileges or immunities, which gives you no right to act unless the State has made or enforced such a law as that! n394

This argument anticipated the Supreme Court's reasoning in the Civil Rights Cases, n395 which struck down the Act. Although often read as holding that Congress has no power to regulate private entities under Section 5 of the Fourteenth Amendment, the opinion actually held the legislation was defective because it was overbroad in that it "applied equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment." n396 The problem was not the absence of "state action" but the absence of state dereliction.

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n394. Cong. Globe, 42d Cong., 2d Sess. 496 (Jan. 22, 1872); accord 2 Cong. Rec. 411 (Jan. 6, 1874) (statement of Rep. Blount).

n395. 109 U.S. 3 (1883). For discussion of the Civil Rights Cases, see infra notes 711-24 and accompanying text.

n396. 109 U.S. at 14.

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A more restrictive version of the argument was made by Senator Gordon of Georgia. To Gordon, federal intervention could not be based on the mere failure of the state to protect Fourteenth Amendment rights; rather, there had to be an actual statute that "denies to one class of citizens rights which are guaranteed by the Constitution to any other class of citizens." n397 If the state passed such a law, Gordon was willing to

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n397. 3 Cong. Rec. 1864 (Feb. 27, 1875).

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admit that under the fifth section of the fourteenth amendment Congress may proceed by appropriate legislation to protect that class of citizens so denied against such discrimination. Until that law is passed, however - until by statute a State denies some rights which belongs to all citizens of the United States as citizens ... - until this is done, I maintain that Congress has no power under the fourteenth amendment to interfere. n398

Similar arguments had been made regarding the power of Congress to enforce the Fifteenth Amendment: unless a state denied or [*1032] abridged voting rights, there would be no ground for federal intervention. n399

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n398. Id.

n399. Cong. Globe, 41st Cong., 2d Sess. 3667 (May 20, 1870) (statement of Sen. Davis); id. at 3608 (May 19, 1870) (statement of Sen. Schurz); id. at 3481 (May 16, 1870) (statement of Sen. Vickers).

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Others, including Lot Morrill, challenged the inclusion of inns, theaters, and places of public amusement in the bill on the quite different ground that these institutions are not subject to special regulation and are indistinguishable from other private businesses. n400 Representative William Phelps noted that "we no longer give to inn-keepers especial privileges - any monopoly in the business; we cannot therefore burden their business with any restrictions." n401 Senator Boreman stated that "cemetery companies owned by private stockholders ... control their own property as any private individual does." n402 In Thurman's hands, this became a broad argument for libertarian principle:

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n400. Cong. Globe, 42d Cong., 2d Sess. app. 4 (Jan. 25, 1872) (statement of Sen. Morrill).

n401. 3 Cong. Rec. 1002 (Feb. 4, 1875); accord 2 Cong. Rec. app. 363 (May 22, 1874) (statement of Sen. Hamilton); Cong. Globe, 42d Cong., 2d Sess. app. 217 (Apr. 13, 1872) (statement of Rep. McHenry); id. at app. 28 (Feb. 6, 1872) (statement of Sen. Thurman).

n402. Cong. Globe, 42d Cong., 2d Sess. 3267 (May 9, 1872).

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I say that it is in the interest of liberty that if any number of persons in the land shall see fit to establish a theater or a place of public amusement for a particular class, they shall have the right to do it, and you abridge and restrain their liberty if you take from them that right. n403

Proponents countered that the bill covered only institutions whose service obligations already were regulated by the common law. n404 Sumner declared to Thurman:

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n403. Id. at app. 27 (Feb. 6, 1827). To similar effect, see 3 Cong. Rec. app. 156-57 (Feb. 3, 1875) (statement of Rep. Smith); 2 Cong. Rec. 4174-75 (May 22, 1874) (statement of Sen. Sargent).

n404. 2 Cong. Rec. 412 (Jan. 6, 1874) (statement of Rep. Lawrence); id. at 340 (1874) (statement of Rep. Butler on Dec. 19, 1873); Cong. Globe, 42d Cong., 2d Sess. 280 (1872) (statement of Sen. Sumner on Dec. 21, 1871).

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The Senator knows well that a hotel is a legal institution; I use the term advisedly, and the Senator is too good a lawyer not to know it. A railroad corporation is also a legal institution. So is a theater, [*1033] and all that my bill proposes is that those who enjoy the benefits of law shall treat those who come to them with equality. n405

Their point was not that the common law courts of the various states had actually recognized the right of black Americans to service without distinction of race. In fact, the common law courts were divided on that question. n406 Rather, the proponents' argument was that once the law had intervened to guarantee white citizens the legally enforceable right of access to common carriers and public accommodations without arbitrary or unreasonable distinctions, n407 the principle of the Fourteenth Amendment required that the same right be extended to black citizens. n408 By virtue of the Fourteenth Amendment, states no longer had the authority to treat race as a reasonable ground for separation or exclusion. Such distinctions, they said, were no proper part of the police power. Representative Elliott put the point this way:

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n405. Cong. Globe, 42d Cong., 2d Sess. 280 (1872) (statement of Sen. Sumner on Dec. 21, 1871); accord 2 Cong. Rec. app. 305 (May 22, 1874) (statement of Sen. Alcorn); id. at 427 (Jan. 6, 1874) (statement of Rep. Stowell).

n406. Compare West Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209 (1867) (allowing separation) with Coger v. North W. Union Packet Co., 37 Iowa 145 (1873) (requiring desegregation). For a full discussion, see supra notes 155-77 and accompanying text.

n407. See, e.g., Brown v. Memphis & C. R. Co., 5 F. 499, 500 (C.C.W.D. Tenn. 1880) (awarding $ 3000 in damages to a woman who was excluded from the ladies' car ostensibly because of her reputation as "a notorious and public courtesan").

n408. Charles Lofgren infers from the repeated statements that the bill would create no new rights but only new remedies that the supporters may have intended to leave in place common law rulings permitting segregated facilities. See Lofgren, supra note 9, at 137. But this misconceives the way in which the common law was understood and employed by the bill's supporters. The common law to which supporters referred was the common law protection of white citizens from unreasonable discrimination - which they maintained was extended by virtue of the Fourteenth Amendment to black citizens as well.

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Is it pretended anywhere that the evils of which we complain ... are an exercise of the police power of the State? Is such oppression and injustice nothing but the exercise by the State of the right to make regulations for the health, comfort; and security of all her citizens? ... Are the colored race to be assimilated to an unwholesome trade or to combustible materials, to be interdicted, to be shut up within prescribed limits? n409

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n409. 2 Cong. Rec. 408 (Jan. 6, 1874).

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Proponents of the bill also denied that Congress had to wait for the states to enact discriminatory laws before it was able to inter [*1034] vene. The Equal Protection Clause deals with "sins of omission as well as commission," in the words of Representative Lawrence. n410 "If a State omits or neglects to secure the enforcement of equal rights," he said, "it "denies' the equal protection of the laws within the meaning of the fourteenth amendment." n411 Federal remedies were needed, proponents maintained, because state remedies were so frequently inadequate - whether because they were too expensive, n412 because state processes of enforcement were infected with racial prejudice, n413 because common law rights and remedies were not specific enough, n414 or because they had been abrogated by law or custom in the case of black citizens. n415 Even if there were no "positive statutes" abrogating common law rights, federal intervention was deemed justified if state remedies were not effective. n416

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n410. Id. at 412, 414.

n411. Id. at 414. Contrary to some commentators (see Heyman, supra note 250, at 509), this does not mean that the Supreme Court's decision in DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), was inconsistent with the original understanding of the Fourteenth Amendment. The Court's holding that the failure of the government to protect Joshua DeShaney from his brutal father did not support an action for damages was confined to the Due Process Clause. The Court explicitly noted that "the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." Id. at 197 n.3. The point is that the right to "protection" is an equality right. Not all denials of protection are unconstitutional, just those linked to invidious discrimination. Joshua DeShaney made no allegation of discrimination.

n412. 2 Cong. Rec. 4082 (May 20, 1874) (statement of Sen. Pratt).

n413. Cong. Globe, 42d Cong., 2d Sess. 3192 (Jan. 15, 1872) (statement of Sen. Sherman); id. at 383 (May 8, 1872) (statement of Sen. Sumner).

n414. Representative Rainey stated:

So far as the common law is concerned, although I am not a lawyer, I am aware, however, that it contains remedial provisions; but they are so general in their character as frequently to lose specific application and force unless wrought into statutory enactment. Hence the necessity for this bill, which sets forth specifically the offenses and the means of redress.

3 Cong. Rec. 959 (Feb. 3, 1875).

n415. 3 Cong. Rec. 940 (Feb. 3, 1875) (statement of Rep. Lawrence); Cong. Globe, 42d Cong., 2d Sess. 3192 (May 8, 1872) (statement of Sen. Sherman).

n416. 2 Cong. Rec. 416 (Jan. 6, 1874) (statement of Rep. Walls).

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There was much discussion of whether federal intervention was necessary, with many Southerners taking the position that blacks already enjoyed equal rights in common carriers and public accommodations. Representative Lucius Q.C. Lamar, the very model of postwar Southern gentility, stated that "throughout the length and breadth of the southern section there does not exist in law one single [*1035] trace of privilege or of discrimination against the black race. If there is," he said, "I know nothing of it." n417 A white representative from Virginia maintained that he had seen black men and women riding in railway cars with white passengers, without hindrance, "a dozen of times," n418 yet Joseph Rainey of South Carolina, the first black man to be elected to the House of Representatives, reported his own experience of being excluded from streetcars in Richmond other than those designated for colored passengers. n419 John Lynch of Mississippi reported that while traveling through the "God-forsaken States of Kentucky and Tennessee" on his way to Washington he was "treated, not as an American citizen, but as a brute" - forced to occupy a "filthy smoking-car" with "drunkards, gamblers, and criminals." n420 Much was

made of the inability of Frederick Douglass - whose ability and character commanded great respect across the spectrum - to dine with his fellow commissioners on a Potomac riverboat during an official trip. n421 Legal theory and actual practice often diverged, as this exchange between Lamar and two Republicans illustrates:

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n417. 3 Cong. Rec. 980 (Feb. 4, 1875).

n418. Id. at 955 (Feb. 3, 1875) (statement of Rep. Whitehead).

n419. Id. at 955, 957.

n420. Id. at 945.

n421. Id. at 979 (Feb. 4, 1875) (colloquy between Reps. Rainey and Sener).

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Mr. HALE, of New York. Now, let me ask the gentleman whether under the laws of the State of Mississippi it is possible for a colored man to travel over the railroads or in any other public conveyances in that State with the same facilities and the same conveniences that a white man may travel?

Mr. LAMAR. I answer my friend from New York with all the emphasis that I can give, that they do travel precisely with the same facilities and with the same conveniences, and a great many more, as there are more of them, than the white people of Mississippi.

....

Mr. McKEE. Let me say that my colleague is correct. In Mississippi, under the laws and under the constitution - republican laws and republican constitution - the colored man has the same rights that a white man has. My colleague is legally correct, but practi [*1036] cally my colleague is mistaken. I refer to the treatment of colored people on steamboats, in hotels, theaters, &c. n422

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n422. Id. at 980.

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c. Access to Common Schools

Neither of the opposition's arguments regarding common carriers and public accommodations could be applied to public schools. Even opponents of the civil

rights bill recognized they could not argue that the right to nondiscrimination in education was already adequately protected under the common law of the states; n423 nor, of course, could they argue that public schools were merely private businesses. Instead, they based their arguments about schools on the theory that civil rights were "fundamental rights" - a category distinct from the positive law as it exists in any particular state - and that education was not such a right.

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n423. See Cong. Globe, 42d Cong., 2d Sess. 894 (Feb. 8, 1872) (argument by Sen. Kelly that remedies are available for many instances of discrimination, but "in the matter of schools it may be different").

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One major strand of the argument was that public schooling cannot be deemed a fundamental right because it is subject to the vagaries of state law. Trumbull explained that the right to go to school "is not any right at all" because it "depends upon what the law of the locality is." n424 The people are entitled only to what they are given by statute. By contrast, he explained:

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n424. Id. at 3190 (May 8, 1872).

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The term civil rights, as I understand it, applies to the rights pertaining to the citizen as such. There may be no schools at all in the State of Indiana or the District of Columbia; and would there then be any right appertaining to the individual as a citizen to go to school? n425

Similarly, Representative Roger Mills posed the question: "Are these fundamental rights? Are they uniform everywhere?" n426 Specifically with reference to schools, he asked, "Is the right one thing in one State, another in another, and still different in a third? If such are the privileges and immunities of citizenship, no man can tell what they are." n427 The implicit comparison to common law [*1037] rights reflects the nineteenth-century view that common law rights transcend state boundaries - that they either are inherent in the nature of things or are a product of general customs and understandings of the people, rather than being subject to the vicissitudes of the positive law of the states. n428

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n425. Id. at 3191.

n426. 2 Cong. Rec. 385 (Jan. 5, 1874).

n427. Id.

n428. Swift v. Tyson, 41 U.S. 1 (1842), overruled by Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see James C. Carter, The Provinces of the Written and the Unwritten Law 51-52 (New York, Banks & Bros 1889); William C. Chase, The American Law School and the Rise of Administrative Government 16 (1982); Morton J. Horwitz, The Transformation of American Law: 1870-1960, at 120 (1992).

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Other opponents relied on the fact that the right to attend public school was largely subject to the "regulation" and discretion of school authorities. Thus, Senator Eugene Casserly pointed to the various distinctions school officials draw among their pupils, based on sex, age, and educational level as well as race, and concluded that "no white parent has a right to claim for his child that he shall be educated in a particular school-house to the exclusion of all others." n429 Trumbull argued

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n429. Cong. Globe, 42d Cong., 2d Sess. 3261 (May 9, 1872).

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that the right to go to school is not a civil right, and that the schools are regulated all over the land, and must be, for the advancement of education. We have graded schools. Boys of one class are kept in one room; of another class in another; the girls are confined to one room and the boys to another; but this is not a denial of civil rights to either. n430

In sum, Trumbull viewed education as a "right growing out of a privilege created by legislation." n431 A similar argument was made about jury service. Senator Morton, a strong proponent of the bill, seemed to concede that it would have no application if the local officials charged with selection of the jury failed to choose black jurors, so long as the laws of the state made no racial distinction; n432 again, the apparent theory was that a privilege so subject to official discretion cannot possibly be a legally enforceable right. n433

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n430. Id. at 3190 (May 8, 1872).

n431. Id. at 3191; see also id. (statement of Sen. Trumbull) (calling education "a privilege that is conferred by a corporation").

n432. See 3 Cong. Rec. 1864 (Feb. 27, 1875).

n433. In light of this theory, Yick Wo v. Hopkins, 118 U.S. 356 (1886), was more problematic than it may appear to us today. In Yick Wo, the Supreme Court held that the San Francisco board of supervisors had violated the Fourteenth Amendment when it systematically denied licenses to operate wooden laundries to Chinese while granting them to whites, notwithstanding that the decision to grant or deny licenses was within the unfettered discretion of the board. See id. at 374. Doctrinally, the analysis was surely affected by the decline of the Privileges or Immunities Clause as the principal focus of the Amendment and

the rise of due process jurisprudence, with its emphasis on the arbitrary exercise of discretion. In an interesting sense, therefore, the too-narrow interpretation in Slaughter-House, see supra notes 236-42 and accompanying text, paved the way for a more expansive interpretation in Yick Wo.

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The application of this theory to the issue of school segregation was perhaps most clearly elaborated by counsel for the school authorities in the 1874 California school desegregation case: n434

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n434. Ward v. Flood, 48 Cal. 36 (1874).

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The Fourteenth Amendment, while it raises the negro to the status of citizenship, confers upon the citizen no new privileges or immunities. It forbids any State to abridge by legislation any of those privileges or immunities secured to any citizen by the second section of the fourth article of the Federal Constitution. They are those great fundamental rights which belong to the citizens of every free and enlightened country, and are so defined in the decisions of all the Courts.

The right of admission to our public schools is not one of those privileges and immunities. They were unknown, as they now exist, at the time of the adoption of the Federal Constitution; that instrument is silent upon the subject of education, and our public schools are wholly the creation of our own State Constitution and State laws.

The whole system is a beneficent State institution - a grand State charity - and surely those who create the charity have the undoubted right to nominate the beneficiaries of it. n435

Other opponents of the bill drew a distinction between rights that may be pursued at the individual's "own expense" - what we would now call "negative rights" - and rights that require the financial support of government. n436 Although they did not explicitly draw the connection, this distinction has roots in the jurisprudence of privileges and immunities under Article IV: citizens of other states are fully entitled to the rights and protections of state law (such as tort and contract), but are not ordinarily entitled to participate in the benefits of programs funded from state taxa [*1039] tion. n437 Senator Vickers, a proponent of this theory, was particularly offended that black citizens would share in the school fund when "[colored people] do not pay one fiftieth part of the taxes necessary for the maintenance of your institutions of learning." n438

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n435. Id. at 40 (argument for defendant) (citation omitted).

n436. E.g., Cong. Globe, 42d Cong., 2d Sess. app. at 42 (Feb. 8, 1872) (statement of Sen. Vickers). See David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986).

n437. See Jonathan D. Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. 487, 491-92, 522-23 (1981).

n438. Cong. Globe, 42d Cong., 2d Sess. app. at 42 (Feb. 8, 1872); accord 2 Cong. Rec. 405 (Jan. 6, 1874) (statement of Rep. Durham).

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There was considerable force to the claim that public school systems in the South, which were the focus of attention in the debates, were too informal and rudimentary to support the notion that there was an established, legally enforceable right to attend public school. No comprehensive public school systems existed at all in the Southern states before the War, and progress after the War was fitful. According to Senator William Stewart, as of 1874 several states continued to lack "an efficient and adequate system of common schools whereby every child may be educated." n439 He thought a constitutional amendment requiring the states to "have an efficient system of common schools" would be more useful than a bill mandating desegregation. n440 Public schools in the Southern states served only a fraction of the school-age population. As of 1872, only half the children of Texas attended school; Mississippi, Florida, and South Carolina did not reach fifty percent participation until 1875, after the Civil Rights Act was passed. n441 Other states lagged even farther behind. In Virginia, according to Representative William Stowell, the public schools remained open only five months a year, and only fifteen percent of the black population attended. n442 Moreover, there continued to be significant resistance to taxation for education. Senator Henry Cooper of Tennessee elaborated on this point:

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n439. 2 Cong. Rec. 4167 (May 22, 1874).

n440. Id.

n441. See Foner, supra note 21, at 366.

n442. 2 Cong. Rec. 426 (Jan. 6, 1874). Similarly, in Alabama official reports (which were probably exaggerated) showed that black school enrollment declined from 32% in 1870 to 24% in 1873. Bond, supra note 65, at 100.

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In many of our States in the South it has always been difficult to maintain a system of common-school education at all. Many of our people, long before the war as well as since, argued that the power [*1040] did not exist in the State to tax the property of the people of the State for the education of the

children. n443

Although a public school system was established in Arkansas in 1868, tax support was so meager that the new schools had closed by 1873 except where supported by private contributions. n444 In Alabama, the large majority of funds appropriated for education were diverted to other uses, and by 1872 the state Superintendent of Public Instruction reported that the system was barely operative. n445 Although much of the rhetoric by Southern politicians prophesying the destruction of the public schools if desegregation were required was undoubtedly bluster, it reflected a reality that the public school systems of the South were fragile and insecure.

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n443. 2 Cong. Rec. 4155 (May 22, 1874); accord Bond, supra note 65, at 101.

n444. Thomas S. Staples, Reconstruction in Arkansas: 1862-1874, at 315, 326 (1923).

n445. See Bond, supra note 65, at 98-99.

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Moreover, the line between public free schools and privately supported charity schools was blurred. "Public" schools relied heavily on private contributions and support, n446 and full tax support for Southern public education was not achieved until years after passage of the Act. n447 The most common form of education in the South was the "academy" n448 - an independent, fee-charging school that sometimes received grants of public land or money. This type of school defies modern categories of "public" and "private." n449 The prevalence of academies meant that public funds often went to schools that retained their legal right to selective admission. None of this comported with the classical conception of a "civil right."

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n446. Much of the financial support for education in the South, especially for black children, came from private sources. See Foner, supra note 21, at 98-99. The George Peabody Educational Fund was a particularly important source of educational funding throughout the South. See Staples, supra note 444, at 321; Frank & Munro, supra note 9, at 466.

n447. See Kaestle, supra note 79, at 117.

n448. Id. at 193. By 1850, more academies were operating in the South than in either New England or the Middle Atlantic region. Id.

n449. Id. at 119; see also id. at 203 (discussing the distribution of state funds to private academies in antebellum North Carolina). For a detailed description of antebellum academies in Georgia, see Dorothy Orr, A History of Education in Georgia 19-49 (1950).

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Proponents of school desegregation legislation were not much concerned by the argument that education was subject to the vagaries of state political action. Their understanding of civil rights [*1041] was based not so much on the proposition that certain rights were stable, uniform and fundamental as on the proposition that the states must extend to their black citizens the "same rights that are secured by law to white people." n450 The measure of civil rights was thus determined not by transjurisdictional criteria of fundamentality, but by the rights accorded under positive law to the most favored class of citizens. Senator Morton explained that the civil rights bill "does not say that schools shall be kept at all, but it contemplates this: that where there are free schools kept at public expense, ... in such cases there shall be an equal right to participate in the benefit of those schools created by common taxation." n451 The states are not required to establish schools, agreed Senator Edmunds, but may not discriminate if they choose to do so:

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n450. Cong. Globe, 42d Cong., 2d Sess. 3193 (May 8, 1872) (statement of Sen. Sherman) (emphasis added); accord 3 Cong. Rec. 1793 (Feb. 26, 1875) (statement of Sen. Boutwell); 2 Cong. Rec. 426 (Jan. 6, 1874) (statement of Rep. Stowell) (arguing that black citizens are entitled to "the same rights everywhere in our broad land" as those accorded to white citizens).

n451. Cong. Globe, 42d Cong., 2d Sess. 3191 (May 8, 1872).

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When the law sets up a common school, which is the creature of the law, there cannot be equality of protection and equality of right when the law of the State ... declares that a man of one color of hair or of skin may send his children, and the man of another color of hair may not send his. n452

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n452. Cong. Globe, 42d Cong., 2d Sess. app. at 26 (Feb. 6, 1872).

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To the argument that the right to an education was subject to various regulations and limitations, the proponents responded that the Constitution places only one restriction on the power of the states to regulate education: that they may not discriminate on the basis of race. Other forms of regulation were of no constitutional concern. Senator Edmunds, for example, said that it had always been "perfectly consistent" with the understanding of "fundamental privileges" that the states could attach "certain qualifications" such as sex, age, learning, or experience. n453 The declarations of the Constitution, he argued, "only say that these common rights ... shall not be invaded on the pretense that a man is of a particu [*1042] lar race or a particular religion." n454 In a reference to the common carrier and public accommodations provisions, but which was equally applicable to the schools provision, Frelinghuysen noted that the proprietor's "discretion as to the particular

accommodation to be given to the guest, the traveler, and the visitor is quite wide." n455 "But," he said, "the law demands that the accommodation shall be good and suitable, and this bill adds to that requirement the condition that no person shall, in the regulation of these employments, be discriminated against merely because he is an American or an Irishman, a German or a colored man." n456

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n453. See 3 Cong. Rec. 1870 (Feb. 27, 1875).

n454. Id. Representative Lynch made a similar point in the House debates. See id. at 943 (Feb. 3, 1875).

n455. 2 Cong. Rec. 3452 (Apr. 29, 1874).

n456. Id.

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Finally, to the argument that civil rights do not include entitlement to benefits funded by the state, proponents countered that the tax-supported character of the schools is a strong additional reason to insist upon equality of treatment within them. "Where schools are maintained and supported by money collected by taxation upon everybody," Morton averred, "there is an equal right to participate in those schools." n457 Indeed, he said, if school authorities draw distinctions on the basis of color, "I say that is a fraud upon those who pay the taxes." n458 "All contribute to the taxes for [support of the schools]; all are benefited by the education given to the rising generation; and therefore all are entitled to equal privileges in the public schools," Sherman agreed. n459

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n457. Cong. Globe, 42d Cong., 2d sess. 3191 (May 8, 1872).

n458. Id.

n459. Id. at 844 (Feb. 6, 1872); accord 2 Cong. Rec. 412 (Jan. 6, 1874) (statement of Rep. Lawrence).

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Even some opponents of the bill repudiated the argument that education is not a civil right, preferring to rest on the separate-but-equal argument. "One of the civil rights of the colored man undoubtedly is the right to be educated out of moneys raised by taxation," stated Representative Robert Vance of North Carolina. n460 Senator Merrimon said that he "admitted ... with all its force" the proposition that "if the State law excludes the colored [*1043] children from the schools entirely, that is a violation of the fourteenth amendment." n461

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n460. 2 Cong. Rec. 555 (Jan. 10, 1874).

n461. Id. app. at 359 (May 21, 1874).

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3. Concern That Desegregation Would Imperil Public Education in the South

Almost as common as the constitutional arguments was the claim that desegregation would imperil or destroy the fledgling public school systems of the Southern states. A universal system of free public education was a relatively recent development even in most of the Northern states, n462 and it was virtually nonexistent in the South prior to the Civil War. n463 The creation of common schools was one of the most important endeavors of the Reconstruction governments of the South. n464 But a lack of facilities, resources, and teachers, aggravated by the uncooperative attitude of many of the Southern people, greatly impeded this effort. The Freedmen's Bureau and various private philanthropic organizations concentrated on forming schools for the newly emancipated freedmen, who had no opportunity of education under the slavery regime. Although open to white children, these schools were almost invariably attended solely by black children. Efforts to establish a comprehensive, state-financed system for all children were somewhat haphazard. Opponents of the civil rights bills warned that desegregation would be fatal to these efforts.

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n462. See Kaestle, supra note 79, at 62-63, 104-35, 182-92 (summarizing the origins of public education in the antebellum North and Midwest).

n463. See id. at 192-216; see also 2 Cong. Rec. 456 (Jan. 7, 1874) (statement of Rep. Butler) (recounting the history of public education in the South).

n464. See Foner, supra note 21, at 365-66.

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The stock rhetoric of the opponents was that the bill would "destroy" public education. n465 Senator Thurman, for example, reminded the Republicans that if there were to be public schools in the Southern states, "those schools must be set up and maintained by the State Legislatures and paid for out of the property of the [*1044] white people of those States." n466 The result of a desegregation law, he warned, "will be that schools will not be established; the taxes will not be laid; the laws for the common-school system will be repealed or rendered nugatory; and the consequence will be that both the negro children and the poor white children too will go without education." n467 Representative Mills of Texas predicted that if the desegregation bill were passed, the common schools would be "broken up in all the Southern States, and private schools established," which would leave the "children of the colored people" to "grow up in ignorance and vice." n468 Representative Durham of Kentucky, after reminding his audience that Kentucky had not ratified the Fourteenth Amendment and bragging of the State's "liberality" in providing "a good system of common schools, which is supported by a direct tax upon the property of the white

people of that State," opined:

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n465. The comments to this effect were so numerous that it would be pointless to cite more than a small sampling. See, e.g., 2 Cong. Rec. app. at 318 (May 22, 1874) (statement of Sen. Merrimon); 2 Cong. Rec. 4155 (May 22, 1874) (statement of Sen. Cooper); id. at 4145 (May 22, 1874) (statement of Sen. Stockton); id. at 421 (Jan. 6, 1874) (statement of Rep. Herndon); id. at 411 (Jan. 6, 1874) (statement of Rep. Blount); id. at 385 (Jan. 5, 1874) (statement of Rep. Mills); Cong. Globe, 42d Cong., 2d Sess. 3262 (May 9, 1872) (statement of Sen. Alcorn); id. app. at 11 (Jan. 30, 1872) (statement of Sen. Saulsbury).

n466. 2 Cong. Rec. 4089 (May 20, 1874).

n467. Id.

n468. Id. at 385 (Jan. 5, 1874). Consequently, Mills warned, "the great evil this bill has in store for the black man is found in the destruction of the common schools of the South." Id.

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Should this bill pass, and the children of freedmen demand admission into these schools, I believe the system in Kentucky will be so injured as to become worthless, and the thousands of children who thus receive a good common-school education, and who are unable to pay in the private schools, will go uneducated. Poor as they are, they will not accept of an education upon such degrading terms. n469

Supporters of school desegregation responded in various ways to these arguments. Some interpreted the warnings as threats, and stood them down. General Butler, for example, said:

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n469. Id. at 406 (Jan. 6, 1874).

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Again, we are told that if we do pass this bill we shall break up the common-school system of the South. I assume this is intended as a threat. If so, to that I answer, as Napoleon did, "France never negotiates under a threat." ... "Break up the common-school system of the South!" Why, sir, until we sent the carpet-baggers down there you had not in fact a common-school system in the South. [Laughter.] n470

[*1045] Some - in particular Republicans from Southern states - stoutly denied that desegregation would have such dire consequences. Senator Henry Pease, who had served for five years as Superintendent of Education in Mississippi,

stated that "none of the difficulties that have been portrayed will obtain in the South." n471 He said that the people had so come to understand the importance of public education that "there is not a State south of Mason and Dixon's line that will abolish its school system." n472 Still others argued that considerations of "expediency" were irrelevant to Congress's responsibility to enforce the Constitution. "Let justice be done though the common schools and the very heavens fall," declared Senator Howe of Wisconsin, from a safe distance. n473 "It is always expedient to do right," agreed Representative Lawrence of Ohio. "Equality of civil and political rights ... is simple justice. The fourteenth amendment was designed to secure this equality of rights; and we have no discretion to say that we will not enforce its provisions." n474 School desegregation "may cause temporary strife," Representative Williams suggested, "but better this than that growing prejudice and growing hate should rend and distract this country ever again." n475 Senator Pratt said to "pass this bill and all [*1046] opposition will cease in a few months, when it is known that the question is settled ...." n476

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n470. Id. at 456 (Jan. 7, 1874). For a similar, if less colorful reaction, see id. at 426-27 (Jan. 6, 1874) (statement of Rep. Stowell).

n471. Id. at 4153 (May 22, 1874).

n472. Id.; see also 3 Cong. Rec. 960 (Feb. 3, 1875) (statement of Rep. Rainey) (referring to "satisfactory results" in the states where school desegregation had been inaugurated); id. at 945 (Feb. 3, 1875) (statement of Rep. Lynch) (referring to experience in Southern states with desegregated education clauses in their constitutions); 2 Cong. Rec. app. at 478-79 (June 16, 1874) (statement of Rep. Darrall) (discussing the success of desegregation in Louisiana); 2 Cong. Rec. 565 (Jan. 10, 1874) (statement of Rep. Cain) (citing experience with integrated public schools in Massachusetts, Rhode Island, and New York, and with the University of South Carolina); Cong. Globe, 42d Cong., 2d Sess. 3193 (May 8, 1872) (statement of Sen. Sherman) (describing experience with integrated schools in Ohio).

n473. 2 Cong. Rec. 4151 (May 22, 1874); see also 3 Cong. Rec. 1005 (Feb. 4, 1875) (statement of Rep. Garfield) (stating "in the long run it is safest for a nation, a political party, or an individual man to dare to do right, and let consequences take care of themselves").

n474. 2 Cong. Rec. 414 (Jan. 6, 1874). Rep. Monroe echoed this sentiment:

If we fail to secure equal protection under the laws, we fail wholly; and it is the duty of Congress, whatever else it may or may not do ... that it shall leave no doubt in the mind of any human being in the land as to the question whether equal protection of the laws shall be extended to all classes of citizens.

Id.

n475. 3 Cong. Rec. 1002 (Feb. 4, 1875).